Supreme Court, U. S.
FILED
JAN 5 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

Of John C. Danforth, Attorney General of Missouri

JOHN C. DANFORTH
Attorney General

KAREN M. IVERSON
Assistant Attorney General

D. BROOK BARTLETT
First Assistant Attorney General

CHRISTOPHER R. BREWSTER
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Appellee (No. 74-1151) and Appellant (No. 74-1419) John C. Danforth

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Table of Citations iii

Opinion Below 1

Jurisdiction 2

The Statute Involved 2

Questions Presented 7

Statement of the Case 10

Summary of the Argument 13

I. Definition of Viability (Section 2(2)) 13

II. Patient Consent Requirement (Section 3(2)) 13

III. Spousal Consent (Section 3(3)) 15

IV. Parental Consent (Section 3(4)) 15

V. Standard of Care (Section 6(1)) 16

VI. Termination of Parental Rights (Section 7) 17

VII. Prohibition of Saline Amniocentesis (Section 9) .. 18

VIII. Record Keeping and Reporting (Section 10 and 11) 18

Argument 19

Introduction 19

A. The History of House Bill 1211 19

B. The Need for an Abortion Statute 20

C. Fundamental Issues Are Involved in This Case 21

I. The trial court properly declared constitutional the definition of viability contained in Section 2(2) of House Bill No. 1211, because:

A. The definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court in Roe v. Wade and reasonably identifies that stage of pregnancy when the interest of the state in protecting potential human life becomes compelling 23

B. The definition of viability contained in House Bill No. 1211 does not unduly interfere with the abortion decision or its effectuation 24

II. The district court properly declared constitutional Section 3(2) of House Bill No. 1211, because requiring that the patient consent in writing constitutes a reasonable means by which the state can assure that a woman's decision to terminate her pregnancy is informed and voluntary 30

III. The trial court properly declared constitutional Section 3(3) of House Bill No. 1211, because requiring spousal consent constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in promoting the stability and protecting the integrity of the institution of marriage ... 34

IV. The district court properly declared constitutional Section 3(4) of House Bill No. 1211, because requiring the consent of a parent or person in loco parentis constitutes a reasonable means of furthering the state's long-standing interest in protecting minors, supporting parents in the discharge of their responsibilities and promoting the stability of the family unit 41

V. The district court erred in holding unconstitutional Section 6(1) of House Bill No. 1211, because:

A. The first sentence of Section 6(1) does not require physicians to employ abortion techniques designed to assure live delivery of the fetus 48

B. Assuming arguendo that this court concludes that the first sentence of Section 6(1) requires physicians to employ abortion techniques designed to assure live delivery of a fetus, that sentence is severable from the remainder of the section 53

VI. The district court properly declared constitutional Section 7 of House Bill No. 1211, because terminating parental rights constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting actual life 54

VII. The district court properly declared constitutional Section 9 of House Bill No. 1211, because:

A. The Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health 57

B. Prohibiting saline amniocentesis constitutes a reasonable means of furthering the State of Missouri's compelling interest in protecting maternal health 62

VIII. The district court properly declared constitutional Sections 10 and 11 of House Bill No. 1211 because reporting and record-keeping requirements do not unduly interfere with the abortion decision or the effectuation of that decision 70

Conclusion 73

Certificate of Service 74

TABLE OF CITATIONS

Cases

Bender v. Bender, 220 S.W. 929 (Mo. 1920) 37

Brown v. United States, 419 F.2d 337 (8th Cir. 1970) .. 28

Danforth v. Rodgers, 414 U.S. 1035 (1973) 10
Dent v. West Virginia, 129 U.S. 114 (1889) 68
Doe v. Bolton, 410 U.S. 179 (1973) .....10, passim
Doe v. Rampton, 366 F.Supp 189 (D.Utah 1973) 27, 52
Duncan v. Louisiana, 391 U.S. 145 (1968) 42

Ferguson v. Skrupa, 372 U.S. 726 (1963) 59, 69
Flast v. Cohen, 392 U.S. 83 (1968) 56

Ginsberg v. New York, 390 U.S. 629 (1968) 41, 45
Goldblatt v. Hempstead, 369 U.S. 590 (1962) 59, 70
Golden v. Zwickler, 394 U.S. 103 (1969) 56
Griswold v. Connecticut, 381 U.S. 479 (1965) 35
Gursky v. Gursky, 39 Misc.2d 1083, 242 N.Y.S.2d 406 (1963) 40
Gustin v. Gustin, 108 Ohio App. 171, 161 N.E.2d 68 (1958) 39

Harman v. Forssenius, 380 U.S. 528 (1965) 53
Harrison v. NAACP, 360 U.S. 167 (1959) 53
Hewett v. McGaster, 133 So.2d 189 (Ala. 1961) 37
Hodgson v. Anderson, 378 F.Supp. 1008 (D.Minn. 1974) app. dismissed 420 U.S. 903 (1975) 27, 52
Hoselton v. Hoselton, 166 Mo. 182, 65 S.W. 1005 (1901) 37
Hunt v. Blackburn, 128 U.S. 464 (1888) 38

In re Gault, 387 U.S. 1 (1967) 43

Kahn v. Shevin, 416 U.S. 351 (1974) 39
Kusper v. Pontikes, 414 U.S. 51 (1973) 53

L—— v. L——, 497 S.W.2d 840 (Mo. App. 1973) 39
Leuzinger v. Merrill, Lynch, Pierce, Fenner and Smith, 396 S.W. 2d 570 (Mo.Banc 1965) 37

McKeiver v. Pennsylvania, 403 U.S. 528 (1971) 42
Maynard v. Hill, 125 U.S. 190 (1888) 35, 41
Meyer v. Nebraska, 262 U.S. 390 (1923) 45

Nelson v. Browning, 391 S.W.2d 873 (Mo. 1965) 42
Nelson v. City of New York, 352 U.S. 103 (1956) 39

Paris Adult Theater I v. Slaton, 413 U.S. 49 (1973) 59
People v. Sorenson, 66 Cal.Rptr. 7, 437 P.2d 495 (Banc 1968) 39
Pierce v. Society of Sisters, 268 U.S. 510 (1925) 45
Planned Parenthood v. Danforth, 392 F.Supp 1362 (E.D. Mo. 1975) 1, 32, 34, 48, 68, 71
Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (E.D.Pa. 1975) 29, 51
Poe v. Ullman, 367 U.S. 697 (1961) 56
Prince v. Massachusetts, 321 U.S. 158 (1944) 41, 45

Reynolds v. United States, 98 U.S. 145 (1878) 35
Rodgers v. Danforth, 410 U.S. 949 (1973) 10
Roe v. Wade, 410 U.S. 113 (1973) .....8, passim

Sproles v. Binford, 286 U.S. 374 (1932) 59, 70
Stanley v. Illinois, 405 U.S. 645 (1972) 55
State v. Chapple, 462 S.W.2d 707 (Mo. 1971) 42
State v. Shoemaker, 62 Iowa 343, 17 N.W. 589 (1883) .. 39

Tinker v. Des Moines Independent School District, 393 U.S. 503 (1969) 42

United States v. Brown, 333 U.S. 18 (1948) 67
United States v. Moore, No. 74-759, 44 U.S.L.W. 4023 (Dec. 9, 1975) 67, 69

Williamson v. Lee Optical, 348 U.S. 483 (1955) 69, 70

Wisconsin v. Yoder, 406 U.S. 205 (1972) 45
Wolfe v. Schroering, 388 F.Supp. 631 (W.D.Ky. 1974) 26, 27, 28
Zwickler v. Koota, 389 U.S. 241 (1967) 53

Statutes and Regulations

Ark. Stat. Ann., Section 61-141(c) (1971) 36
Cal. Civ. Code Ann., Section 216 (West Supp. 1975) 36
Ga. Code Ann., Section 74-101.1(a) (1973) 36
Ga. Code Ann., Section 84-932 (Supp. 1974) 37
Kan. Stat. Ann., Section 23-129 (1974) 36
Missouri
House Committee Substitute for House Bill No. 1211 .....2, passim
Section 2(2) .....7, passim
Section 3(2) .....8, passim
Section 3(3) .....8, passim
Section 3(4) .....8, passim
Section 5 .....11, passim
Section 6(1) .....9, passim
Section 7 .....9, passim
Section 9 .....9, passim
Sections 10 and 11 .....10, passim
Section 12 28
Section 14 28
Section B 54

Chapter 160, RSMo 1969, as amended 42
Chapter 167, RSMo 1969, as amended 42
Section 192.020 RSMo 1969 72
Section 192.040 RSMo 1969 72
Section 193.100 RSMo 1969 72
Section 193.140 RSMo 1969 72
Chapter 195, RSMo 1969, as amended 72
Chapter 210, RSMo 1969, as amended 42
Chapter 211, RSMo 1969, as amended 42
Section 211.411, RSMo 1969 .....17, 56
Section 211.441, RSMo 1969 56
Section 211.511, RSMo 1969 56
Chapter 294, RSMo 1969, as amended 42
Section 311.310, RSMo 1969 42
Section 431.060, V.A.M.S. (Sept. 1975 pamphlet) 43
Section 434.060, RSMo 1969 43
Section 442.080, V.A.M.S. (Sept. 1975 pamphlet) 43
Section 451.090, RSMo 1969 43
Chapter 452, RSMo 1969, as amended 10
Section 452.310.4, RSMo 1973 supp. 40
Section 452.320, RSMo 1973 supp. 40
Section 453.030, RSMo 1969 36
Section 474.150, RSMo 1969 37
Chapter 475, RSMo 1969, as amended 42
Section 475.010(4), RSMo 1969 42
Section 507.110, RSMo 1969 42
Section 513.475.2, RSMo 1969 37
Sections 563.170-563.210, RSMo 1969 35
Section 563.310, RSMo 1969 42

Section 563.780, RSMo 1969 42
Section 563.880, RSMo 1969 42
Section 564.610, RSMo 1969 42
Supreme Court Rule 54.17, V.A.M.R. 40
Supreme Court Rule 55.25 V.A.M.R. 40
N.C. Gen. Code, Section 49A-1 (Cum.Supp. 1974) 36
14 Cons. Laws N.Y. Ann., Domestic Relations, Sec. 73 (McKinney Supp. 1975) 36
Okla. Stat. Ann., Tit. 10, Section 553 (Supp 1975) 37
Pa. Cons. St., Tit. 6601 et seq. 51
United States
42 U.S.C. 257(a) 69
21 U.S.C. 801, et seq. 69
Va. Code, Section 64.1-7.1 (Cum. Supp 1975) 36
Va. Code, Section 32-423 (Cum. Supp 1975) 37

Other Authorities

61 Am. Jur.2d, Physicians & Surgeons, Sections 155-161 46
Annot. 76 A.L.R. 564-565 (1932) 46
Annot. 139 A.L.R. 1370 (1942) 46
4 Thompson on Real Property, Section 1784 38

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1976

No. 74-1151

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., and MICHAEL FREIMAN, M.D., Appellants,

vs.

JOHN C. DANFORTH, Attorney General of the State of Missouri, and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

No. 74-1419

JOHN C. DANFORTH, Attorney General of the State of Missouri, Appellant,

vs.

PLANNED PARENTHOOD OF CENTRAL MISSOURI, a Missouri Corporation, DAVID HALL, M.D., MICHAEL FREIMAN, M.D., and J. BRENDAN RYAN, Circuit Attorney of the City of St. Louis, Missouri, Appellees.

On Appeal from the United States District Court for the Eastern District of Missouri, Eastern Division

BRIEF

Of John C. Danforth, Attorney General of Missouri

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Missouri, Eastern Division, in *Planned Parenthood of Central Missouri, et al. v. John C. Danforth, Attorney General of the State of Missouri, et al.*, is reported at 392 F.Supp. 1362 (E.D. Mo. 1975).

JURISDICTION

On January 31, 1975, the United States District Court for the Eastern District of Missouri, Eastern Division, entered an "Order, Judgment and Decree" declaring unconstitutional Section 6(1) of House Bill No. 1211, and granting an injunction against the enforcement thereof. On February 6, 1975, appellant John C. Danforth filed a "Motion to Alter or Amend Judgment," which was denied by the district court on February 12, 1975. Appellant John C. Danforth filed his Notice of Appeal in the United States District Court for the Eastern District of Missouri, Eastern Division, on March 14, 1975.

Jurisdiction of this Court in Cause Number 74-1419 is predicated upon 28 U.S.C. Section 1253, which authorizes a direct appeal from the order of a three-judge court declaring a state statute unconstitutional and enjoining enforcement thereof. Appellants challenge the jurisdiction of this Court in Cause No. 74-1419 (Appellants' Brief at 17-18), contending that the injunctive relief granted by the district court was "unwarrantedly and improvidently granted." In view of the fact that appellants requested a temporary restraining order, preliminary injunction and permanent injunction to restrain all challenged sections of House Bill No. 1211, they cannot be heard to complain.

THE STATUTE INVOLVED

House Committee Substitute for House Bill No. 1211, enacted in 1974 by the Seventy-Seventh General Assembly, Second Regular Session, has not yet been printed in the Missouri Revised Statutes. However, the text of House Bill No. 1211 can be found in the 1975 Appendix Pamphlet to Vernon's Annotated Missouri Statutes.

In its entirety, House Bill No. 1211 provides as follows:

H.C.S. House Bill No. 1211

AN ACT relating to abortion with penalty provisions and emergency clause.

Be it granted by the General Assembly of the State of Missouri, as follows:

SECTION 1. It is the intention of the general assembly of the state of Missouri to reasonably regulate abortion in conformance with the decisions of the supreme court of the United States.

SECTION 2. Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

(1) **"Abortion",** the intentional destruction of the life of an embryo or fetus in his or her mother's womb or the intentional termination of the pregnancy of a mother with an intention other than to increase the probability of a live birth or to remove a dead or dying unborn child;

(2) **"Viability",** that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;

(3) **"Physician",** any person licensed to practice medicine in this state by the state board of registration of the healing arts.

SECTION 3. No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

(1) By a duly licensed, consenting physician in the exercise of his best clinical medical judgment.

(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and

that her consent is informed and freely given and is not the result of coercion.

(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother.

(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother.

SECTION 4. No abortion performed subsequent to the first twelve weeks of pregnancy shall be performed except where the provisions of section 3 of this act are satisfied and in a hospital.

SECTION 5. No abortion not necessary to preserve the life or health of the mother shall be performed unless the attending physician first certifies with reasonable medical certainty that the fetus is not viable.

SECTION 6. (1) No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo.

(2) Whoever, with intent to do so, shall take the life of a premature infant aborted alive, shall be guilty of murder of the second degree.

(3) No person shall use any fetus or premature infant aborted alive for any type of scientific, research, laboratory or other kind of experimentation either prior to or subsequent to any abortion procedure except as necessary to protect or preserve the life and health of such premature infant aborted alive.

SECTION 7. In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant.

SECTION 8. Any woman seeking an abortion in the state of Missouri shall be verbally informed of the provisions of section 7 of this act by the attending physician and the woman shall certify in writing that she has been so informed.

SECTION 9. The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy.

SECTION 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of rele-

vant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

2. The forms shall be provided by the state division of health.

3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

SECTION 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years.

SECTION 12. Any practitioner of medicine, surgery, or nursing, or other health personnel who shall willfully and knowingly do or assist any action made unlawful by this act shall be subject to having his license, application for license, or authority to practice his profession as a physician, surgeon, or nurse in the state of Missouri rejected or revoked by the appropriate state licensing board.

SECTION 13. Any physician or other person who fails to maintain the confidentiality of any records or reports required under this act is guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 14. Any person who contrary to the provisions of this act knowingly performs or aids in the performance of any abortion or knowingly fails to perform any action required by this act shall be guilty of a misdemeanor and, upon conviction, shall be punished as provided by law.

SECTION 15. Any person who is not a licensed physician as defined in section 2 of this act who performs or attempts to perform an abortion on another as defined in subdivision (1) of section 2 of this act, is guilty of a felony, and upon conviction, shall be imprisoned by the department of corrections for a term of not less than two years nor more than seventeen years.

SECTION 16. Nothing in this act shall be construed to exempt any person, firm, or corporation from civil liability for medical malpractice for negligent acts or certification under this act.

SECTION A. Because of the necessity for immediate state action to regulate abortions to protect the lives and health of citizens of this state, this act is deemed necessary for the immediate preservation of the public health, welfare, peace and safety, and is hereby declared to be an emergency act within the meaning of the constitution, and this act shall be in full force and effect upon its passage and approval.

SECTION B. If any provision of this Act or the application thereof to any person or circumstance shall be held invalid, such invalidity does not affect the provisions or application of this Act which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

Approved June 14, 1974.

Effective June 14, 1974.

QUESTIONS PRESENTED

I. Section 2(2) of House Bill No. 1211 defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural

or artificial life-supportive systems." The questions presented are:

A. Whether "viability," as defined in Section 2(2), conforms with the definition adopted by this Court in *Roe v. Wade*, 410 U.S. 113 (1973); and

B. If not, whether "viability," as defined in Section 2(2), interferes with the right of women to terminate their pregnancies as enunciated in *Roe v. Wade*, 410 U.S. 113 (1973).

II. Section 3(2) of House Bill No. 1211 provides that an abortion shall not be performed unless the patient certifies in writing that she consents to the abortion, and that her consent is informed and voluntary. The question presented is:

A. Whether Section 3(2) constitutes a reasonable means by which the State of Missouri can assure that a woman's decision to terminate her pregnancy is informed and voluntary.

III. Section 3(3) of House Bill No. 1211 provides that no abortion shall be performed on a married woman without the written consent of her husband, unless the abortion is necessary to preserve the life of the woman. The question presented is:

A. Whether Section 3(3) constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in promoting the stability and protecting the integrity of the institution of marriage.

IV. Section 3(4) of House Bill No. 1211 provides that no abortion shall be performed on an unmarried woman under the age of eighteen without the written consent of one parent or a person *in loco parentis*, unless the abortion is necessary to preserve the life of the woman. The question presented is:

A. Whether Section 3(4) constitutes a reasonable means of furthering the long-standing interest of the State of Missouri in protecting minors, supporting parents in the discharge of their responsibilities and promoting the stability of the family unit.

V. Section 6(1) of House Bill No. 1211 imposes upon physicians an affirmative duty to take reasonable measures to sustain the lives of fetuses who survive the abortion procedure. The questions presented are:

A. Whether the first sentence of Section 6(1) requires that physicians employ abortion procedures designed to assure live delivery of the fetus; and

B. If so, whether the first sentence of Section 6(1) is severable from the remainder of the section.

VI. Section 7 of House Bill No. 1211 provides that any fetus who survives an elective abortion procedure shall become a ward of the state, and the rights of parents who consented to the abortion procedure shall be terminated as provided in Missouri's Juvenile Code, Chapter 211, RSMo. 1969, as amended. The question presented is:

A. Whether termination of parental rights after a fetus survives an elective abortion procedure constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting human life.

VII. Section 9 of House Bill No. 1211 prohibits the use of a procedure known as "saline amniocentesis" following the first 12 weeks of pregnancy. The questions presented are:

A. Whether the Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health; and

B. Whether prohibiting the use of saline amniocentesis constitutes a reasonable means of furthering the compelling interest of the State of Missouri in protecting maternal health.

VIII. Sections 10 and 11 of House Bill No. 1211 provide for the promulgation of rules, regulations and forms for the purpose of compiling medical data relating to abortion procedures. The question presented is:

A. Whether Sections 10 and 11 unduly interfere with the abortion decision or its effectuation.

STATEMENT OF THE CASE

In January of 1973, this Court declared unconstitutional the criminal abortion statutes of Texas and Georgia in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 197 (1973). Several cases then pending before this Court were remanded for reconsideration, including *Rodgers v. Danforth*, 410 U.S. 949 (1973), wherein Missouri's former criminal abortion statutes were challenged as unconstitutional. A three-judge federal court in the Western District of Missouri declared the Missouri statutes unconstitutional, and that court's judgment was affirmed on appeal. *Danforth v. Rodgers*, 414 U.S. 1035 (1973).

After two legislative sessions, the Seventy-Seventh Missouri General Assembly, Second Regular Session, enacted House Committee Substitute for House Bill No. 1211 (hereinafter referred to as "House Bill No. 1211" or "Missouri abortion law"), for the stated purpose of regulating abortions within the parameters defined in *Roe v. Wade*, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973).

On June 14, 1974, the Honorable Christopher S. Bond, Governor of the State of Missouri, signed into law House Bill No.

1211, which became effective immediately by reason of an emergency clause. On June 17, 1974, Planned Parenthood of Central Missouri, David Hall, M.D., and Michael Freiman, M.D. (hereinafter "plaintiffs") filed suit seeking a declaratory judgment and injunctive relief to restrain the operation of House Bill No. 1211, alleging that facially and as applied, the newly enacted Missouri abortion law was unconstitutional.

In their application for a temporary restraining order and in their argument presented in support thereof, plaintiffs challenged specifically only Sections 2(2), 6(1), 7 and 9. (Memorandum of Plaintiffs in Support of Prayer for Temporary Restraining Order, filed June 17, 1974.) At the show cause hearing for a preliminary injunction held on June 24, 1974, plaintiffs expanded their challenges to include Sections 3(3) and 3(4). During the deposition of plaintiff Michael Freiman, M.D., on July 3, 1974, Sections 3(2), 10 and 11 were added to plaintiffs' list of challenged sections. On July 18, 1974, several days before the evidentiary hearing was scheduled to commence, plaintiffs advised defendant of their intention to challenge in addition Sections 5, 6(3) and 8, and on July 19, 1974, plaintiffs added Section 4 to the list.

At the commencement of trial on July 22, 1974, defendant moved for a continuance in order to prepare evidence and arguments on the expanding list of challenged sections. His motion was sustained with respect to Sections 4, 5, 6(3) and 8 (R. 2-11). On July 22 and 23, 1974, evidence was heard on the remaining sections designated by plaintiffs in the pretrial proceedings. After defendants rested and plaintiffs declined rebuttal, the district court continued the cause until September 16, 1974, for the purpose of hearing evidence on Sections 4, 5, 6(3) and 8. Thereupon, counsel for plaintiffs withdrew the challenge to said sections. (R. 377-378.)

On January 31, 1975, the three-judge federal district court filed its "Order, Judgment and Decree" upholding the constitu-

tionality of Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, and denying plaintiffs' request for an injunction against enforcement of those sections. In addition, the court declared Section 6(1) unconstitutional, and granted an injunction against its enforcement. On February 5, 1975, plaintiffs filed their Notice of Appeal to this Court. On February 6, 1975, John C. Danforth, hereinafter "defendant," filed a "Motion to Alter or Amend Judgment," with suggestions in support thereof, which motion was denied by the court on February 12, 1975. On March 14, 1975, defendant filed his Notice of Appeal to this Court.

On or about February 10, 1975, plaintiffs filed a "Motion for Stay of Application and Enforcement of Statute, Pending Appeal to the United States Supreme Court, and Authorities in Support Thereof." Although only Sections 2(2), 3(3), 3(4), 6(1), 7, 9, 10 and 11 were challenged at trial, (R. 2-11, 377-378), this Court stayed enforcement of House Bill No. 1211 on February 18, 1975.

On or about March 12, 1975, plaintiffs filed their Jurisdictional Statement in Cause Number 74-1151. On April 9, 1975, defendant John C. Danforth filed a letter with the Court agreeing with plaintiffs that the questions presented were so substantial as to require plenary consideration with briefs on the merits and oral argument. Thereafter, on May 13, 1975, defendant John C. Danforth filed his Jurisdictional Statement in Cause Number 74-1419. On or about May 29, 1975, plaintiffs filed their Motion to Affirm the judgment of the district court. On October 6, 1975, this Court noted probable jurisdiction.

SUMMARY OF ARGUMENT

I. Definition of Viability

A. In *Roe v. Wade*, 410 U.S. 113 (1974), this Court described a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 160. Section 2(2) defines viability as "that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems." Accordingly, the definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court and reasonably identifies that stage during gestation when the interest of the state of Missouri in protecting potential human life becomes compelling.

B. Because viability varies with each patient, there is no consensus among the medical community as to when viability occurs. All medical witnesses who testified at trial agreed that physicians are capable of ascertaining, with reasonable medical certainty, whether a fetus is viable as that term is defined in Section 2(2) of House Bill No. 1211. Section 2(2) authorizes the physician to make this determination in the exercise of his medical judgment. A mistaken determination of non-viability does not subject the physician to criminal or civil liability. Therefore, the absence of an objective standard of viability does not chill the effectuation of a woman's decision to terminate a pregnancy.

II. Patient-Consent Requirement

In enunciating the right of women to terminate their pregnancies, this Court in *Roe v. Wade*, 410 U.S. 113 (1973), contemplated that her decision would be made in consultation

with her physician. As the evidence at trial demonstrated, in reality there is frequently no opportunity for the woman to consult with a physician for the purpose of determining whether pregnancy termination is in *her* best interest. Many abortions are performed in out-patient clinics and teaching hospitals and not by the woman's regular physician. Often the woman does not even meet the physician until she arrives at the clinic for her abortion. Whatever counseling takes place may be performed by nonmedical personnel with no special skill, training or experience.

The evidence below also demonstrated that it is very stressful on a woman to consider terminating her pregnancy and the decision to do so is frequently quite tenuous. Yet the circumstances confronting the woman dictate that the decision be hurriedly made and executed. Further, the woman may be exposed to pressures from others who may impel her improvidently to terminate her pregnancy.

By requiring that the woman consent in writing to the abortion the State seeks to formalize the decision-making process, to increase the woman's opportunity to reflect upon a serious decision and to enable her to recognize that in the final analysis only she can decide to terminate her pregnancy.

Requiring that the patient consent to an abortion neither impedes the abortion decision nor imposes a burden on physicians because it is universal medical practice to secure the patient's consent to all surgical procedures. Even prior to enactment of House Bill No. 1211, Missouri physicians did not perform abortions without first obtaining their patients' informed and written consent. For these reasons, Section 3(2) constitutes a reasonable means by which the state can assure that the woman's decision to terminate her pregnancy is informed and voluntary.

III. **Spousal Consent**

Section 3(3) furthers a compelling interest of the state of Missouri not considered in *Roe v. Wade* or *Doe v. Bolton*. That interest is in promoting the stability and in protecting the integrity of the institution of marriage.

This Court has long recognized that marriage is a status which is regulated by the state. Legislatures enact laws defining the obligations and liabilities of marriage and proscribing those activities which are deleterious to marriage. Criminal statutes, including those relating to adultery and bigamy, restrict the absolute freedom of an individual for the sake of protecting the marital unit.

It is inherent in the status of marriage that certain decisions must be made jointly by husband and wife, or not made at all. Especially, this is true with respect to the bearing and raising of children. Procreation can be prevented by one party to the marriage. However, the decision to change the family status and to have children is normally made jointly by husband and wife. A number of statutes recognize that joint decisions are inherent in the status of marriage. Statutes provide that the decision to place a child for adoption must be made jointly if the parents are married. Moreover, statutes governing artificial insemination and sterilization require agreement by husband and wife. Typically, spousal consent is required for the disposition of property.

The Missouri General Assembly properly found that Section 3(3) was a reasonable and necessary means of protecting the institution of marriage against unilateral decision making by the wife.

IV. **Parental Consent**

Section 3(4) of House Bill No. 1211 extends to the area of abortion traditional state measures designed to protect minors

from the consequences of improvident decisions and to support parents in the discharge of their familial responsibilities. As the evidence below demonstrated, the abortion decision is stressful, but it must be hurriedly made and executed. Many abortions are performed in out-patient clinics and teaching hospitals rather than by the patient's regular physician. Counseling is performed largely by lay volunteers with no particular skill, experience or competence in assisting the minor to make an informed decision.

Implementation of Section 3(4) imposes no additional burden upon physicians, for even prior to enactment of House Bill No. 1211 physicians required parental consent before they would perform an abortion on a minor. The grave considerations inherent in the abortion decision and the manner in which abortion services are provided require that the pregnant minor receive the sensitive guidance of an adult who has a particular concern for her welfare. For these reasons, Section 3(4) constitutes a reasonable means of furthering the State's interest in protecting the welfare of minors and in supporting parents in the discharge of their responsibilities to their children.

V. **Standard of Care**

A. The district court erroneously interpreted the first sentence of Section 6(1) of House Bill No. 1211 as establishing a standard of care applicable to physicians during the abortion procedure. The court's interpretation is not supported by the language of the provision, the legislative history of House Bill No. 1211, or the testimony of the principal sponsor of the statute.

Properly interpreted, Section 6(1) applies only after an abortion has been performed and a live fetus results. When that occurs, physicians have an affirmative duty to take measures to encourage or to sustain the life of the fetus who survived the

abortion procedure. The state has a compelling interest in protecting human life. *Roe v. Wade*, 410 U.S. 113, 160-163 (1973). Section 6(1) constitutes a reasonable means of protecting actual human life.

To resolve the challenge to this section requires construction of the language used by the Missouri General Assembly. Under defendant's interpretation, Section 6(1) is constitutional; under plaintiffs' interpretation it is not. Accordingly, this Court should abstain from construing Section 6(1) and refer plaintiffs to Missouri courts for resolution of this issue. In the alternative, if this Court reaches the merits and concludes that the first sentence of Section 6(1) is unconstitutional, that sentence can be severed from the remainder of the section, for it was the clear intent of the Missouri General Assembly to declare as manslaughter the failure to encourage or to sustain the life of a fetus who survives an abortion.

VI. **Termination of Parental Rights**

The state has a compelling interest in protecting actual life surviving an abortion. *Roe v. Wade*, 410 U.S. 113 (1973). Section 7 of House Bill No. 1211 furthers this interest by transferring to the State custody of a child who survives an elective abortion. Inherent in the decision to abort is a threat to the future well-being of the child, which the legislature reasonably believed required termination of parental rights.

If parents who consented to the abortion change their mind and want the child after all, they can regain custody. Section 7 provides for the termination of their rights in accordance with Section 211.441, RSMo 1969. An order for termination entered pursuant to that section is not final for one year thereafter. During that period, therefore, parents may petition the court to grant them custody on the ground that they are fit parents.

VII. **Prohibition of Saline Amniocentesis**

A. The state has a compelling interest in protecting maternal health, *Roe v. Wade*, 410 U.S. 113 (1973), and may adopt reasonable regulations in furtherance of that interest applicable after the first trimester of pregnancy. On the basis of medical evidence and testimony, the Missouri General Assembly determined that a mid-trimester abortion procedure, known as saline amniocentesis, is deleterious to maternal health. Accordingly, they prohibited use of that procedure after the first trimester.

The medical testimony and exhibits presented at trial amply support the finding that saline amniocentesis is deleterious to maternal health. Further, the evidence below demonstrated the availability of alternative procedures for mid-trimester abortion, some of which are safer than saline amniocentesis. Section 9 constitutes a reasonable measure in furtherance of the State's compelling interest in protecting maternal health.

Missouri's prohibition of the more dangerous of two alternative mid-trimester abortion procedures was based on competent medical evidence, and this Court should defer to the finding of the Missouri General Assembly. Further, the prohibition of saline amniocentesis does not impermissibly limit physicians in the practice of their profession, for they have no constitutionally protected right to practice medicine free from governmental regulation.

VIII. **Record-Keeping and Reporting**

Sections 10 and 11 of House Bill No. 1211 are rationally related to the State's interest in protecting the health of its citizens. These provisions have no impact on the woman's decision to terminate her pregnancy, they do not impair the privacy of the physician-patient relationship, and they impose no undue burden on physicians in the practice of their profession.

ARGUMENT

Introduction

A. **The History of House Bill No. 1211**

Roe v. Wade, 410 U.S. 113 (1973) and *Doe v. Bolton*, 410 U.S. 179 (1973) permitted states to regulate and even proscribe abortion under certain circumstances. The essence of the holdings in those two cases was that: 1) a woman has a qualified right to obtain an abortion; 2) the state's compelling interest in protecting maternal health justifies reasonable regulation of abortion procedures and facilities after the first twelve weeks of pregnancy; and 3) the state's compelling interest in potential human life justified prohibition of abortions after viability, except when necessary to preserve the life or health of the woman.

House Bill No. 1211, enacted after two legislative sessions of work, constitutes a well-considered and good faith effort by the Missouri General Assembly to follow the guidelines set forth in *Roe v. Wade* and *Doe v. Bolton*. House Bill No. 1211 requires that all abortions be performed by physicians licensed by the state of Missouri; that abortions after the first twelve weeks be performed in hospitals; and that abortions after viability be prohibited except when necessary to preserve the life or health of the mother. Each of these provisions is expressly permitted by *Roe* and *Doe*. Furthermore, exercising the authority granted by *Roe v. Wade* to regulate abortions after the first trimester, the Missouri General Assembly, after considering medical evidence, prohibited saline amniocentesis—one method of mid-trimester abortion—which it found to be dangerous to maternal health.

In addition, the Missouri General Assembly addressed itself in House Bill No. 1211 to several problems not considered by this

Court in *Roe* and *Doe*. Those problems include: (1) spousal consent, (2) parental consent where the woman is an unmarried minor under the age of 18, (3) parental rights where abortion produces a live fetus, and (4) the duty of the physician when abortion produces a live fetus.

B. The Need for an Abortion Statute

Throughout their brief, plaintiffs complain that the Missouri General Assembly has "singled out" abortion "for individualized statutory attention." *See, e.g.*, Plaintiffs' Brief at 37, *et seq*. In response, there are two reasons for the existence of special statutes on abortion.

First, in *Roe v. Wade* and *Doe v. Bolton*, this Court not only created a vacuum in abortion regulation by striking down existing statutes, but also set forth guidelines to be followed by any state legislatures desiring to fill that vacuum by enacting a statute regulating abortion. In response to *Roe* and *Doe*, Missouri enacted a special abortion statute which, among other things, distinguished between the three stages of pregnancy, regulated post first-trimester abortions to protect the health of the woman, and prohibited abortions after viability except to preserve the life or health of the woman.

Second, as a matter of fact abortion is not similar to other surgical procedures.[9] It is *sui generis*, and there is ample authority in the record for this proposition. (*See, e.g.* Widdicombe, R. 145, et seq.) Abortion is distinguishable from other surgical procedures in the following ways: 1) Abortion is frequently elective and not therapeutic. It requires an informed decision by the patient, and is not simply a matter of following the advice of a physician for the sake of preserving one's health. 2) The abortion decision is stressful and tenuous for the woman, and it involves emotional aspects not present in most medical

procedures. 3) Abortions are often performed quickly on a mass production basis at out-patient clinics. Such abortions are not "personalized", and are not the result of ongoing medical consultation. 4) There is no physician-patient relationship in many abortions for the reason that they are performed in a brief period of time at clinics or teaching hospitals by physicians who do not know the patients. 5) As a legal and widely used practice, abortion is a relatively new procedure.

C. Fundamental Issues Are Involved in This Case

In resolving the questions raised in this case, the Court is asked to address itself to fundamental issues which extend far beyond the abortion controversy. Those issues include the right of the legislature to define the obligations and responsibilities of marriage, the rights of children *vis a vis* the responsibilities of parents, and the authority of government to regulate the practice of medicine. In addition, this case concerns the degree to which this Court will substitute its judgment on questions of domestic relations and public health for the judgment of a state legislature.

Stated in their most basic terms, the positions of plaintiffs and defendant on three of the sections which raise problems of tremendous significance beyond abortion can be summarized as follows:

1. **With respect to spousal consent, Section 3(3):**

   Plaintiffs see marriage as the cohabitation of two individuals, each of whom possesses separate individual rights which may be in conflict. For plaintiffs, abortion is a purely personal right of the woman, and the status of marriage can place no limitations on personal rights. Defendant, on the other hand, sees marriage as an institution, the nature of which places limitations on the absolute individualism of

its members. The institution of marriage is protected by law, which defines its obligations and restricts the absolute independence of married persons. Defendant argues that joint decision making is inherent in the institution of marriage, and is insisted upon by legislatures in several areas, including placing a child for adoption, artificial insemination, sterilization and the conveyance of property. Defendant believes that the logical extension of plaintiffs' view of marriage would be to declare unconstitutional all statutes limiting the absolute freedom of a married person. Among these would be statutes prohibiting adultery and bigamy and statutes which require spousal consent before placing a child for adoption, before artificial insemination and before sterilization.

2. **With respect to parental consent, Section 3(4):**

The differences between plaintiffs and defendant on this issue were foreshadowed but not resolved in this Court's opinion and the dissent in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Plaintiffs see minors as enjoying precisely the same rights as adults. They interpret *In re Gault*, 387 U.S. 1 (1967) as meaning that minors must, for all purposes, be treated by the law as adults. Defendant believes that where discretion and decision making are involved, the legislature may properly provide that parental guidance is necessary. Defendant argues that extending procedural fairness to minors in the court system is not the same as vesting minors with the power to make decisions in situations where maturity and judgment are important. The logical extension of plaintiffs' view would be to declare unconstitutional all statutes which limit the freedom of minors to vote, get married, buy liquor and buy and sell property.

3. **With respect to saline amniocentesis, Section 9:**

Plaintiffs insist that a physician has a "right" to practice medicine as he pleases, unencumbered by governmental control over the procedures he uses. Implicit in plaintiffs argument is that the Court should review, in depth, the medical considerations involved, and substitute its judgment for the judgment of the legislature. Defendant states that doctors have no "right" to practice medicine, that federal and state governments have the power to prohibit certain medical practices, and that the court should defer to the judgment of the legislature in weighing the advisibility of specific regulations. Defendant believes that the logical extension of plaintiffs' argument would be to declare unconstitutional all governmental restrictions on the practice of medicine, including those of the Food and Drug Administration.

I

The Trial Court Properly Declared Constitutional the Definition of Viability Contained in Section 2(2) of House Bill No. 1211,[1] because:

A. **The definition of viability contained in House Bill No. 1211 conforms with the definition adopted by this Court in Roe v. Wade and reasonably identifies that stage of pregnancy when the interest of the state in protecting potential human life becomes compelling.**

This Court held in *Roe v. Wade*, 410 U.S. 113 (1973), that the state's interest in protecting potential human life becomes

---

[1] Section 2(2) of House Bill No. 1211 provides as follows:

"Unless the language or context clearly indicates a different meaning is intended, the following words or phrases for the purpose of this act shall be given the meaning ascribed to them:

* * * * * * *

" 'Viability', that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems;"

compelling when the fetus is "viable." 410 U.S. at 163. In furtherance of that compelling interest, the state may restrict or even proscribe abortions after the fetus becomes viable. This Court defined a viable fetus as one "potentially able to live outside the mother's womb, albeit with artificial aid." 410 U.S. at 163.

Section 2(2) of House Bill No. 1211, defines viability as follows:

> ". . . that stage of fetal development when the life of the unborn child may be continued indefinitely outside the womb by natural or artificial life-supportive systems."

A comparison of Section 2(2) with the definition of viability adopted by this Court reveals no material difference. What difference exists in the wording adopted by the Missouri General Assembly would appear to favor plaintiffs. Arguably, that point when the life of the fetus can be "continued indefinitely" (House Bill No. 1211), would occur later in a pregnancy than that point when the fetus is "potentially able to live outside the mother's womb. . . ." (*Roe v. Wade*, 410 U.S. at 160.) Accordingly, the definition of viability challenged herein conforms with that adopted by this Court, and the judgment of the district court declaring it constitutional should be affirmed.

B. **The definition of viability contained in House Bill No. 1211 does not unduly interfere with the abortion decision or its effectuation.**

No evidence adduced at trial supports plaintiffs' conclusory allegations that the definition of viability contained in Section 2(2) of House Bill No. 1211 interferes with their right to practice medicine[2] or with the right of women to obtain abortions.

[2] Throughout their brief plaintiffs assert a "right to practice medicine." Defendant submits that doctors have no right to practice medicine as they see fit, free of governmental regulation. The only right to practice medicine possessed by physicians relevant to the issues herein is derivative of the woman's right to terminate a pregnancy.

Indeed, plaintiff Hall agreed with the definition of viability challenged herein:

> "Section 2, paragraph 2: My only comment here is that although I agree with the definition of 'viability' I think that it must be understood that viability is a very difficult state to assess. And that the exact art of medicine makes it difficult to be sure at exactly how many weeks a pregnancy exists at any given point in time." (Deposition of plaintiff Hall, a portion of which was read into evidence, R. 369.)

The evidence adduced below established that the length of pregnancy is determined by counting from the first day of the last menstrual period (Warren, R. 14), based on the medical history provided by the patient (Klaus, R. 277). Fetal or uterine size can be measured by palpitation of the uterus (Anderson, R. 355), or by ultrasound (Anderson, R. 355; Warren, R. 18). The probability of fetal survival *ex utero* at a given gestational age is plotted on charts commonly used by obstetricians and gynecologists in the practice of their specialities (Warren, R. 66; Anderson, R. 362; Klaus, R. 277; Def. Ex. F, R. 374 and Def. Ex. N, R. 374). Generally, physicians would agree that viability may occur at twenty-six to twenty-eight weeks (Warren, R. 68; Kerenyi, R. 92; Anderson, R. 356).

Plaintiffs maintain that Section 2(2) is unconstitutional because: 1) it attempts to define viability, thereby interfering with the professional judgment of physicians (Plaintiffs' Brief at 67-68, 70); 2) it fails to define viability by reference to a specific gestational age, thereby offering no guidance to the physician who seeks to avoid engaging in criminal conduct (Plaintiffs' Brief at 65-67, 70); and 3) it purports to confer upon physicians the foresight to determine the survivability of a particular fetus,

which is impossible until after the fetus has been expelled or removed from the uterus (Plaintiffs' Brief at 67-68).

Apparently, plaintiffs do not contest the right of states to proscribe abortion after viability. They argue inconsistently that states must define viability by objective standards, but cannot define viability without unconstitutionally interfering with the professional judgment of physicians. In short, it appears to be plaintiffs' position that while the state may proscribe abortions after viability, *Roe v. Wade*, 410 U.S. at 162-164, the state may not define viability.

Defendant submits that Section 2(2) embodies the flexible medical standard contemplated by this Court in *Roe v. Wade*. The determination of when the fetus is viable rests, as it should, with the physician, in the exercise of his medical judgment, on a case-by-case basis. *Wolfe v. Schroering*, 388 F.Supp. 631 (W.D. Ky. 1974). Even plaintiffs' medical witnesses testified that a physician reasonably can estimate whether a fetus is viable on the basis of the duration of the pregnancy and the size of the fetus. (Warren, R. 18; Kerenyi, R. 92.)

Plaintiffs' reliance upon *Wolfe v. Schroering, supra*, is misplaced. Notwithstanding their inference to the contrary, the language quoted at page 65 of plaintiffs' brief prompted the court to *uphold* the challenged definition of viability ("that stage of human development when the life of the unborn child may be continued by natural or life-supportive systems") and the prohibition against aborting fetuses that ". . . may reasonably be expected to have reached viability." *Wolfe v. Schroering*, 388 F.Supp. at 637. Indeed, the court specifically rejected the contention advanced by plaintiffs herein that viability must be defined as occurring no sooner than twenty-four weeks (Plaintiffs' Brief at 65-67, 70). The court acknowledged the references in *Roe v. Wade*, 410 U.S. at 160, to twenty-eight and twenty-four weeks, but noted that viability was also defined as

that time when the fetus "presumably has the capability of meaningful life outside the mother's womb." *Roe v. Wade*, 410 U.S. at 163; *Wolfe v. Schroering*, 388 F.Supp. at 636. The court reasoned that because viability varies, the point at which the state's interest becomes compelling also varies, and the determination of viability must be left to physicians in the exercise of their medical judgment. *Wolfe v. Schroering*, 388 F.Supp. at 636-637.

Plaintiffs also misrepresent the holding in *Hodgson v. Anderson*, 378 F.Supp. 1008 (D. Minn. 1974), app. dismissed, 410 U.S. 903 (1975), by quoting out of context the language of the court (Plaintiffs' Brief, at 63-64). The constitutional defect in the Minnesota statute was the prohibition of abortions when the fetus is "potentially viable," which was defined as the second half of its gestation, or at approximately twenty weeks. The district court concluded that this prohibition effectively proscribed abortions prior to viability and could not be justified as a regulation in furtherance of the state's interest in protecting maternal health. *Hodgson v. Anderson*, 378 F.Supp. at 1012, 1016. Unlike the definition considered in *Hodgson*, Section 2(2) does not fix viability at an arbitrary point in gestation or prohibit abortions prior to viability. Nor has Missouri defined viability expansively, akin to the Utah definition ("any reasonable possibility of survival") declared unconstitutional in *Doe v. Rampton*, 366 F.Supp. 189 (D.Utah 1973). In fact, the original version of House Bill No. 1211 was amended by adding the word "indefinitely" to restrict viability to those cases in which there would be sustained fetal survival (O'Toole, R. 176, 196-197).

Plaintiffs contend Section 2(2) subjects physicians to the risk of criminal prosecution in estimating whether the fetus is viable. Because in their view the definition establishes a standard of "possible evanescent survivability" (Plaintiffs' Brief at 68), which defendant disputes, they argue further that physicians confronted with the threat of prosecution will err on the side of

caution and refuse to perform abortions if there is any remote possibility that the fetus may survive.

House Bill No. 1211 imposes no sanctions on a physician who incorrectly estimates the maturity or viability of the fetus.[3] Section 5, which was *not* challenged by plaintiffs, (R. 2-11, 377-378; Plaintiffs' Brief, at 22), provides that:

> "No abortion not necessary to preserve the life or health of the mother shall be performed *unless the attending physician first certifies with a reasonable medical certainty that the fetus is not viable.*" (Emphasis supplied.)

While the failure to *certify* non-viability may be punishable pursuant to Sections 12 and 14 of House Bill No. 1211, the failure to estimate correctly is not. If the Missouri General Assembly had intended to subject physicians to prosecution for errors in medical judgment, it would simply have prohibited abortions after viability. This they did not do. Instead, the physician need only certify, within a reasonable medical certainty, that the fetus is not viable.

Defendant submits that the conclusion reached in *Wolfe v. Schroering*, 388 F.Supp. at 636, 637, and by the district court below comports with this Court's analysis of the logical and biological justifications for identifying "viability" as the point in gestation when the interest of the state in protecting potential human life becomes compelling. *Roe v. Wade*, 410 U.S. at 150, 160-163. Because viability may vary from patient to patient and with advancements in medical technology, it is essential that physicians make the determination in the exercise of their medical judgment.

---

[3] Similarly, under Missouri law physicians are not civilly liable for an honest error in judgment, even if there is an erroneous or mistaken diagnosis. *Brown v. United States*, 419 F.2d 337 (8th Cir. 1970).

While the court in *Planned Parenthood Association v. Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975), declared unconstitutional a definition of viability similar to Section 2(2) of House Bill No. 1211, the conclusion was predicated upon the fact that there is no consensus among the medical community as to when viability occurs. For precisely that reason the determination must be left to physicians, for state legislatures are in no better position to make that determination. The court did, however, find a consensus among the medical community as to the *method* by which viability can be determined. Defendant submits that provisions like Section 2(2) permit physicians to apply that method and exercise their judgment. To uphold the conclusion reached in *Planned Parenthood Association v. Fitzpatrick, supra,* and mandate that states define viability by reference to a specific point in gestation would result in precisely that "Procrustean bed constructed of legislatively defined facts and circumstances" which plaintiffs' counsel has so poetically described (Plaintiffs' Brief, at 70).

Defendant agrees that "viability" will vary, that it is a difficult state to assess (Hall, R. 369), and that it must be left to the physician's judgment. All medical witnesses who testified at trial agreed that physicians are capable of ascertaining, within a reasonable medical certainty, whether a fetus is viable as that term is defined in Section 2(2) of House Bill No. 1211. Accordingly, plaintiffs' allegations that Section 2(2) contravenes the right of women to obtain abortions and the "right" of physicians to practice their profession are wholly without merit. For these reasons, the judgment of the district court declaring Section 2(2) constitutional must be affirmed.

II

The District Court Properly Declared Constitutional Section 3(2) of House Bill No. 1211[4] Because Requiring That the Patient Consent in Writing Constitutes a Reasonable Means by Which the State Can Assure That a Woman's Decision to Terminate Her Pregnancy Is Informed and Voluntary.

In *Roe v. Wade*, this Court contemplated that a woman's decision to terminate a pregnancy would be made in consultation with her responsible physician. 410 U.S. at 153, 163. By requiring the patient's written consent to an abortion, the Missouri General Assembly seeks to formalize that decision-making process and to assure that the woman's decision is informed and freely given. The evidence adduced at trial demonstrates the necessity for such a measure.

A woman's decision to terminate a pregnancy is stressful and tenuous (Warren, R. 30; Anderson, R. 351, 352). Of necessity, the abortion decision must be hurriedly made and executed. A woman is frequently exposed to conflicting pressures from parents, husband, putative father or peers, who, because of their personal interests, might impel the woman improvidently to terminate her pregnancy. Having recognized the conflicts and pressures inherent in the abortion decision, this Court contemplated that the woman would reach her decision in consultation with her responsible physician. *Roe v. Wade*, 410 U.S. at 153, 163.

A thoughtful dialogue between doctor and patient during which the medical, emotional, psychological and financial ramifi-

---

[4] Section 3(2) of House Bill No. 1211 provides as follows: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * *

"(2) After the woman, prior to submitting to the abortion, certifies in writing her consent to the abortion and that her consent is informed and freely given and is not the result of coercion."

cations of the decision may be thoroughly explored is a laudable ideal. However, many abortions are performed in out-patient clinics such as those operated by Reproductive Health Services, Inc. (5,620 per year, Widdicombe, R. 148), Planned Parenthood of Central Missouri (5 to 6 per week or 44 between May 10, 1974, and July 22, 1974, Davis, R. 140, 135), and in teaching hospitals such as Mount Sinai School of Medicine (several hundred first trimester and 12,000 second trimester abortions in 4 years, Kerenyi, R. 81), and Yale-New Haven Hospital (2,600 in one year, Anderson, R. 350).

Typically, abortion procedures are not performed by the patient's regular physician, and a physician does not counsel the patient. As a matter of fact, the patient frequently does not even meet the physician who will perform the procedure until she arrives at the clinic for her abortion (Widdicombe, R. 158-159; Davis, R. 137-139; Anderson, R. 351). Finally, the physician who performs the abortion spends little time with the patient. For example, at the clinic operated by Reproductive Health Services, Inc., one of the twelve physicians on their roster will perform eight abortions in a period of three and one-half hours (Widdicombe, 159-160). In other words, the physician spends on the average only twenty-six minutes per patient.

Whatever counseling is provided is not performed by the physician, but by volunteers and staff counselors (Davis, R. 137), by "social workers, nurses, psychologists, clergymen, people who have undergraduate and graduate degrees" (Widdicombe, R. 156), or by personnel of Clergy Counselling Service (Anderson, R. 351). There appears to be no requirement that these "counselors" have any special skill, competence or experience, which would help the patient to make what is acknowledged to be a stressful decision. Further, their affiliation with clinics whose primary business is to provide abortions may suggest that they are predisposed to encourage abortions and that they do not have sufficient disinterest to advise patients fairly.

When *Roe v. Wade* was decided, our nation had but limited experience with providing abortion services. Now that abortions are widely available, evidence like that adduced at trial demonstrates the necessity of adopting measures designed to improve the quality of the decision-making process. Defendant submits that the district court properly concluded that the patient-consent requirement serves the state's legitimate interest in assuring that the decision to terminate a pregnancy be informed. *Planned Parenthood v. Danforth*, 392 F.Supp. 1362, 1369 (E.D. Mo. 1975). See also, concurring opinion by Webster, Circuit Judge, at 1374-1375.

The interest of the state in protecting the health and welfare of its citizens justifies reasonable regulations to insure the integrity of a woman's decision to terminate her pregnancy. Plaintiffs presented no evidence at trial demonstrating that implementation of Section 3(2) will prevent the termination of a single pregnancy or impose upon physicians any burden whatsoever.

Although no Missouri statute requires the written consent of a patient to medical treatment, as a matter of fact and as a matter of law, consent of the patient is required for all surgery. Section 3(2) merely codifies the universal practice of the medical profession to obtain the patient's written consent for all surgical procedures (O'Toole, R. 177; Klaus, R. 279-280; Def. Ex. A, R. 70, 374; Def. Ex. B, R. 70, 374; and Def. Ex. C, R. 70, 374). Even prior to enactment of House Bill No. 1211, Missouri physicians did not perform abortions without first obtaining their patients' informed and written consent. (Warren, R. 21, 22, 69; Widdicombe, R. 161-162; Def. Ex. GG, R. 162, 375-376; and Def. Ex. HH, R. 142, 375-376.)

When a woman discovers she is pregnant, the nature of her condition impells haste. In addition to pressures of time, she is frequently subjected to pressures from husband, putative father, parents or peers to persuade her to terminate her

pregnancy. If she tentatively decides to terminate or to consider terminating her pregnancy, she is removed from a familiar medical environment and from her regular physician. She may receive no professional or medical counseling, and the time she spends with the physician who will perform the abortion is insufficient to establish a sound doctor-patient relationship.

The objective of Section 3(2) is only to formalize the decision-making process and to increase the pregnant woman's opportunity to reflect upon a stressful and serious decision. This requirement provides a final moment of introspection and helps the woman recognize that only she can decide to terminate her pregnancy. No one—putative father, husband, parents, peers or physicians—can make that decision for her or compel her to undergo an abortion.

The district court found that the patient-consent requirement constitutes a reasonable measure to serve the legitimate interest of the state in preserving the quality of the woman's decision. Against this finding plaintiffs contend simply that Section 3(2) injects into the physician-patient relationship "suspicion, concern, and doubt by the inference that an uninformed, duressed (sic) or coerced consent may occur in the absence of such certification." (Plaintiffs' Brief at 71.) If plaintiffs' analysis were correct, then the physician-patient relationship has always been in jeopardy, for as previously noted, Section 3(2) merely codifies the universal medical practice for all surgical procedures.

The consent provision contained in Section 3(2) of House Bill No. 1211 reasonably serves the legitimate interest of the State in protecting the health and welfare of its citizens. A statutory requirement for a patient's consent to an abortion does not prevent abortion, does not limit the availability of abortions, does not impair the physician-patient relationship and does not impose any burden on plaintiff-physicians or their patients. For these reasons, the judgment of the district court declaring Section 3(2) constitutional must be affirmed.

III

The Trial Court Properly Declared Constitutional Section 3(3) of House Bill No. 1211,[5] Because Requiring Spousal Consent Constitutes a Reasonable Means of Furthering the Long-Standing Interest of the State of Missouri in Promoting the Stability and Protecting the Integrity of the Institution of Marriage.

Underlying the spousal consent requirement in Section 3(3) is the Missouri General Assembly's perception of marriage as an institution, the nature of which entails joint decision making with respect to major changes in family status. (O'Toole, R. 178-179.) Absent this requirement of spousal consent, nothing would prevent the wife from making a unilateral, even secret decision to change the structure of the family unit with respect to the birth of a child, and perhaps with respect to the future child bearing potential of the marriage.[6]

---

[5] Section 3(3) of House Bill No. 1211 provides as follows:

"No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * * *

"(3) With the written consent of the woman's spouse, unless the abortion is certified by a licensed physician to be necessary in order to preserve the life of the mother."

[6] The court below stated:

"Testimony and exhibits introduced at the trial of the instant case establish that there is a direct relationship between induced abortions and the incidence of infertility, premature and still births resulting from subsequent pregnancies (Dr. Backer, Tr. 219, 222-223, Defts' Exs. V, O, S and T). Infants born prematurely are in turn subject to numerous physical and mental defects (Dr. Backer, Tr. 221-222). We are, therefore, not concerned merely with a husband's interest in seeing that a particular fetus conceived by the partners to the marriage is carried to term. We are also confronted with the fact that the decision of whether or not to abort one pregnancy may have a profound effect on the future reproductive capacity of the marriage." *Planned Parenthood v. Danforth*, 392 F. Supp. at 1370.

Historically, this Court has viewed the institution of marriage as more than the cohabitation of two atomistic individuals, each pursuing his or her separate rights. In *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965), the Court said:

> "Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

This Court has recognized the public interest in protecting the institution of marriage and the authority of legislatures to regulate its obligations and liabilities. *Maynard v. Hill*, 125 U.S. 190 (1888), *Reynolds v. United States*, 98 U.S. 145 (1878). In *Maynard v. Hill*, the Court said of the marriage relationship:

> "The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and society, without which there would be neither civilization nor progress." 125 U.S. at 211.

In regulating the status and obligations of marriage, legislatures traditionally have placed limitations on what would, absent marriage, be permissible individual conduct. As a matter of criminal law, an individual does not enjoy the same freedom over his body when married as he does when single. For example, adultery is a criminal offense which does not exist apart from the institution of marriage. Statutes prohibiting adultery have been enacted to protect marital fidelity, and they are clearly constitutional. *See* concurring opinion of Justice Goldberg, *Griswold v. Connecticut*, 381 U.S. at 498-499. Similarly, statutes such as Sections 563.170 through 563.210, RSMo 1969, mak-

ing bigamy a criminal offense, restrict the freedom of an individual because he or she is married.

The spousal consent requirement in House Bill No. 1211 is consistent with other laws regulating the status and obligations of marriage. Legislatures have determined that it is essential to the integrity of the institution of marriage that important decisions changing the structure or status of the marriage relationship be made by both parties, especially where those changes relate to the bearing and raising of children.

In Missouri, for example, the decision to allow a child to be adopted may be made by the mother alone, if the child is born out of wedlock. However, if the child is born in wedlock, the consent of both parents is required. Section 453.030, RSMo 1969. Thus, when birth occurs, the status of marriage limits what would otherwise be the mother's exclusive right to decide not to raise the child. In the adoption statute, as in the abortion statute, it is the status of being married and not fatherhood alone that gives the father the power to consent. The adoption statute, like the abortion statute, protects the interest of the husband in the family. It does not protect the interest of an unmarried father in his biological offspring. In both adoption and abortion, joint decision-making by husband and wife is treated by the legislature as an element of marriage.

Those states which have enacted laws relating to artificial insemination have conditioned the legitimacy of children so conceived on the consent of both husband and wife to the procedure. Kan.Stat.Ann. Sec. 23-129 (1974); Ga. Code Ann. Sec. 74-101.1(a) (1973); 14 Con. Laws N.Y. Ann., Domestic Relations, Sec. 73 (McKinney Supp. 1975); Va. Code Sec. 64.1-7.1 (1975 Cum. Supp.); Ark.Stat.Ann. Sec. 61-141(c) (1971); Cal. Civ.Code Ann. Sec. 216 (West Supp. 1975); N.C. Gen. Code Sec. 49A-1 (Cum.Supp. 1974). Indeed, Oklahoma expressly forbids the practice of artificial insemination without

the written consent of husband and wife. Oklahoma Stat.Ann., Tit. 10, Section 553 (Supp. 1975).

Two states have enacted laws requiring spousal consent for voluntary sterilization procedures. Georgia, Section 84-932, Ga. Code Ann. (1974 Supp.); Virginia, Section 32-423, Va. Code (1975 Cum. Supp.). Here again, the freedom of a married woman to make her own decisions with respect to child bearing has been limited by statute and conditioned on agreement by the spouse. To insist on joint decision making between husband and wife as a means of preserving and strenghtening the institution of marriage is within the state's power and is not unconstitutional.

The requirement of spousal consent has long been recognized in the law as a limitation on one party's power to dispose of his real property as he pleases. Once married, a man cannot convey good title to the homestead he shares with his wife, unless she consents to the disposition. Section 513.475.2, RS Mo. 1969. The fact that the interests of the husband and wife may conflict or that the husband and wife are separated does not obviate the requirement that both must join in the conveyance of the homestead. *Hoselton v. Hoselton*, 166 Mo. 182, 65 S.W. 1005 (1901); *Hewett v. McGaster*, 133 So.2d 189 (Ala. 1961). Furthermore, as a practical matter, the absence of spousal consent can defeat any real estate conveyance by a married person because the conveyance is presumed in fraud of marital rights. Section 474.150, RSMo. 1969.

Similarly, property held jointly by husband and wife is presumed in Missouri to be held by the entirety. *Leuzinger v. Merrill, Lynch, Pierce, Fenner and Smith*, 396 S.W.2d 570 (Mo.Banc. 1965). This is so even where the property has been obtained solely with the funds of one spouse. *Bender v. Bender*, 220 S.W. 929 (Mo. 1920). A tenancy by the entirety is an estate peculiar to the status of marriage, and any act affecting

title to the property must be achieved jointly by husband and wife. *Hunt v. Blackburn*, 128 U.S. 464 (1888); 4 Thompson on Real Property (1961 replacement) Section 1784. Where changes in property interests are concerned, Missouri insists on joint decision making between husband and wife, which on occasion probably thwarts an individual spouse's desires.

The requirement of spousal consent for the abortion decision is consistent not only with other statutes requiring joint decision making where major changes are made affecting the marriage, but with the best professional thinking on family relations as well. At the trial, William F. Kenkel, Ph.D., Chairman of the Department of Sociology at the University of Kentucky, who has worked extensively in the field of family relations, testified that those things that encourage mutuality, trust, openness and honesty strengthen the institution of marriage. Accordingly, Dr. Kenkel testified that requiring spousal consent to an abortion would strengthen the marital relationship and the institution of marriage. (Kenkel, R. 235-237.)

By enactment of Section 3(3) the state seeks only to safeguard the interdependence and unity of interest essential to the marital relationship by requiring that the decision to terminate a pregnancy, like the decision to conceive, be made jointly or not at all. One party to a marriage can prevent the occurrence of pregnancy by practicing contraception. Recognizing that the consent of both parties is generally necessary to change the *status quo* and to begin a family, the legislature has determined that a change in the family structure set in motion by mutual consent should be terminated only by mutual consent. Contrary to the argument advanced by the plaintiff, the Missouri statute does not seek to give the husband a veto power over the wife's decision to have an abortion. Rather, the legislature has sought to insure that the wife not be able to exercise a veto over a decision which previously was jointly made—the decision to have children.

In attacking the requirement of spousal consent, plaintiffs conjure up a series of hypothetical situations—a "parade of horribles"—which plaintiffs claim illustrate the hardships caused by a spousal consent requirement. Legislation is not unconstitutional merely because, when applied to particular instances, its operation may prove harsh. *Nelson v. City of New York*, 352 U.S. 103 (1956). If this statute is to be struck down it must be because it is unconstitutional—not because, in particular hypothetical situations based on hypothetical facts, the law may prove harsh. *Kahn v. Shevin*, 416 U.S. 351 (1974). Should some of plaintiffs' hypothetical situations occur, a spousal consent requirement may work a hardship because the marriage relationship may be in trouble or in reality non-existent.[7] However, the Missouri legislature did not attempt to do the impossible, i.e., enact a statute which varied its requirements depending on the health of a particular marriage. Missouri's General Assembly did what legislatures have traditionally done; it exercised the policy making

---

[7] In situations where the husband is not the father of the fetus, plaintiffs maintain that a husband who withholds his consent to abortion does so with "no legal obligations, duties or rights in regard to the resulting child following birth." (Plaintiffs' Brief at 82.) In such circumstances, plaintiffs contend that a husband "would be free to turn his back and to ignore the child's welfare." (*Id.*) There is no merit to this argument.

A husband may not escape liability for the support of his wife's children merely because he is not their biological father. Where there is evidence that a man has actually or impliedly consented to support an illegitimate child born to his wife, the law will enforce that promise. Thus, support duties have been imposed where the husband knew his wife to be pregnant by another man at the time of their marriage. *State v. Shoemaker*, 62 Iowa 343, 17 N.W. 589 (1883); *Gustin v. Gustin*, 108 Ohio App. 171, 161 N.E.2d 68 (1958); L—— v. L——, 497 S.W.2d 840 (Mo. App. 1973). In like manner, the California Supreme Court unanimously upheld the imposition of criminal responsibility for non support where the defendant husband refused to provide for a child born to his wife after her artificial insemination with the sperm of an anonymous donor. *People v. Sorenson*, 66 Cal.Rptr. 7, 437 P.2d 495 (Cal. Banc 1968). Noting that the child would not have been procreated with-

power inherent in the legislative branch of government for what was believed to be in the best interests of all the people of Missouri. By enacting Section 3(3) the Missouri legislature expressed its belief that open communication and joint decision making between spouses in determining whether to terminate a pregnancy would, *as a general matter*, strengthen a marriage. Section 3(3) focuses not on one spouse or the other but on what was believed by the Missouri legislature to be in the best interests of marriage as an institution.[8]

If a healthy marriage no longer exists or if one or both spouses no longer wish to accept the obligations and responsibilities associated with being married in Missouri, the legislature has provided a means for the rapid dissolution of that relationship.[9] So long as people choose to remain married, they must accept certain obligations and responsibilities be-

---

out the defendant's active participation and consent, the court rejected the defendant's attempt to avoid liability on grounds that he was not the biological father of the child:

> "One who consents to the production of a child cannot create a temporary relation to be assumed and disclaimed at will, but the arrangement must be of such a character as to impose an obligation of supporting those for whose existence he is directly responsible." 66 Cal.Rptr. at 11, 437 P. 2d at 499.

It cannot be maintained that the courts would somehow impose a lesser duty on a husband who, having withheld his consent to abortion, sought to "turn his back" on the child subsequently born to his wife. See *Gursky v. Gursky*, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (1963).

[8] See footnote 6 on page 34 quoting the lower court's finding that the decision to abort may have an adverse effect on the future reproductive capacity of the marriage.

[9] It should be noted that Missouri's new "no fault" divorce statute, Chapter 452, RSMo 1969 (1973 Supp.) obviates the most likely circumstances hypothesized in plaintiff's' brief. In many cases, a divorce could be obtained followed by an abortion. For example, in the case of a husband who is absent and his whereabouts are unknown, Sections 452.310.4 and 452.320, RSMo 1973 Supp., when read in conjunction with Rules 54.17 and 55.25 V.A.M.R., provide that a divorce can be obtained in fifty-five days.

lieved by their elected representatives to be in the best interests of society and the institution of marriage.

Section 3(3) constitutes a reasonable exercise of legislative power to preserve and strengthen an institution which ". . . is the foundation of the family and society, without which there would be neither civilization nor progress." *Maynard v. Hill*, 125 U.S. at 211. Unless doubt is to be cast on a state's power and authority to engage in such a noble and traditional endeavor, this Court should affirm the lower court's decision upholding the constitutionality of Section 3(3).

IV

The District Court Properly Declared Constitutional Section 3(4) of House Bill No. 1211,[10] Because Requiring the Consent of a Parent or Person in Loco Parentis Constitutes a Reasonable Means of Furthering the State's Long-Standing Interest in Protecting Minors, Supporting Parents in the Discharge of Their Responsibilities and Promoting the Stability of the Family Unit.

As a general proposition, courts have recognized that minors, under many circumstances, are incapable of rational, informed and mature decisions in crucial matters. *See, e.g., Ginsberg v. New York*, 390 U.S. 629, 643 (n. 10) (1968). In addition, the law may subject minors to more stringent limitations than would be permissible if imposed on adults, even when protected freedoms are involved. *Prince v. Massachusetts*, 321 U.S. 158

---

[10] Section 3(4) of House Bill No. 1211 provides as follows: "No abortion shall be performed prior to the end of the first twelve weeks of pregnancy except:

* * * * * * *

"(4) With the written consent of one parent or person in loco parentis of the woman if the woman is unmarried and under the age of eighteen years, unless the abortion is certified by a licensed physician as necessary in order to preserve the life of the mother."

(1944); *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969); *McKeiver v. Pennsylvania*, 403 U.S. 528 (1971); *Duncan v. Louisiana*, 391 U.S. 145 (1968). "Minor," when used without further limitation as to age, is interpreted in Missouri as being any person under the age of twenty-one. 475.010(4), RSMo 1969; *State v. Chapple*, 462 S.W.2d 707, 709-710 (Mo. 1971); *Nelson v. Browning*, 391 S.W.2d 873, 880-881 (Mo. 1965).

Missouri law is replete with provisions reflecting the interest of the state in assuring the welfare of minors. For example, minors must be represented by a guardian *ad litem* or next friend to assert or protect their rights and interests in Missouri courts. Section 507.110, RSMo 1969. Missouri makes special provisions respecting the estates of minors (Chapter 475, RSMo 1969, as amended), the care of delinquent and neglected children (Chapter 211, RSMo 1969, as amended), medical treatment for various disabilities (Chapter 210, RSMo 1969, as amended), child labor (Chapter 294, RSMo 1969, as amended), and compulsory education (Chapters 160 and 167, RSMo 1969, as amended). Implicit in all such legislation is the assumption that minors require the assistance of parents and the state in acquiring the skills and knowledge for making rational and mature judgments in the conduct of their affairs.

Certain decisions are considered by the state to be outside the scope of a minor's ability to act in his own best interest or in the interest of the public. For example, it is unlawful to sell firearms and deadly weapons to minors without parental consent, Section 564.610, RSMo 1969; minors may not be exposed to certain types of literature, Section 563.310, RSMo 1969; pawnbrokers may not purchase property from minors without the consent of the parent, Section 563.780, RSMo 1969; cigarettes (Section 563.880, RSMo 1969) and alcoholic beverages (Section 311.310, RSMo 1969) may not be sold to minors. Parents may sue to recover money lost by a minor's gambling. Section

434.060, RSMo 1969. Parental consent is also required for minors under designated ages to marry (Section 451.090, RSMo 1969). Minors under 18 years of age are not considered competent to enter into contracts. Section 431.060 V.A.M.S. (Sept. 1975 Pamphlet). Furthermore, minors under the age of 18 years may disavow real estate conveyances "within two years after the disability of the minority is removed." Section 442.080, V.A.M.S. (Sept. 1975 Pamphlet). These statutory provisions reflect the judgment of the Missouri General Assembly that, in certain situations, parental guidance must be provided to protect minors where their lack of mature judgment and experience may endanger their well-being or may result in otherwise harmful consequences. Minors do not enjoy the same freedom to make decisions and to act as they please as is enjoyed by adults.

In re Gault, 387 U.S. 1 (1967), does not require that the law must treat minors and adults as identical for all purposes. When a child is before the court, he must be treated fairly, and accorded procedural due process. But this does not mean that a minor possesses the same maturity and judgment as an adult. A legislature may reasonably conclude that, as a general matter, minors do not have the same capacity to make wise decisions as adults, and that where emotionally charged decisions are to be made, parental consent is necessary.

The necessity for adult guidance in making the decision whether to terminate a pregnancy was dramatically demonstrated at trial. First, there is in reality no physician-patient relationship as contemplated by this Court in *Roe v. Wade*, 410 U.S. at 163. Frequently, the abortion decision is not made by a woman in consultation with her responsible physician because many abortions are performed in clinics and teaching hospitals (Davis, R. 140, 135; Widdicombe, R. 148; Kerenyi, R. 81; Anderson, R. 306), where the physician who performs the abortion is not the woman's regular doctor. Whatever counseling is furnished is not provided by the physician who will perform the procedure, and

frequently not by persons with any medical training or experience (Davis, R. 137; Widdicombe, R. 156; Anderson, R. 351).

Children as young as ten years of age have sought abortions (Widdicombe, R. 164), and abortions have been performed on children of the ages of eleven (Widdicombe, R. 164) and thirteen (Warren, R. 74). This Court already has recognized the serious considerations to be weighed in deciding whether to terminate a pregnancy. In addition, the evidence adduced at trial established that a great deal of stress is frequently involved in deciding whether to terminate a pregnancy. The decision to do so may be very tenuous. Warren, R. 30; Anderson, R. 351-352. For the State to permit children to obtain abortions without the counsel of an adult who has responsibility or concern for the child would constitute an irresponsible abdication of the State's duty to protect the welfare of minors.

Plaintiffs allege that Section 3(4) permits parents to prevent their daughter from obtaining an abortion without good reason or for no reason at all. Underlying that contention is an assumption that parents would not have the best interest of their daughters at heart. If it is reasonable to make any assumption, common sense dictates that above all other persons, parents recognize the emotional, psychological, physical and financial burdens associated with bearing and raising children. It would appear likely that their experience with the realities of child-raising would render them sensitive to their daughter's plight and, if anything, dispose them to favor terminating a pregnancy, particularly in the situations described by plaintiffs at page 95 of their brief.

If parents and their daughter have any difference of opinion, it may well be the daughter who favors carrying the pregnancy to term to demonstrate her adulthood, to precipitate a marriage, or to effectuate naive and unrealistic perceptions of motherhood. If such a conflict arises, the child cannot be compelled to

undergo an abortion against her will by virtue of Section 3(2) of House Bill No. 1211, discussed in Point II, ante.[11]

Apart from protecting minors from their own improvidence, the state has a legitimate interest in requiring that a parent or person *in loco parentis* consent to the abortion of a minor. The primary responsibility for the custody, care and nurture of the child resides in her parents. In discharging their responsibilities, parents are entitled to the support and assistance of the state. *Ginsberg v. New York*, 390 U.S. 629 (1968); *Prince v. Massachusetts*, 321 U.S. 158 (1944). Indeed, parental discretion has been protected from unwarranted or unreasonable interference by the state. *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

Section 3(4) of House Bill No. 1211 is reasonably related to the purpose of supporting the family in the discharge of its responsibilities. The testimony adduced at trial established that it is essential for the family in our society to provide for minors' economic support, to proetct them from the physical environment and psychological harm, and to offer guidance, counseling and security. Anything that interferes with these functions is deleterious to the family as a social unit and hampers the development of responsible, healthy adults (Kenkel, R. 238). Thus, it was the opinion of Dr. William F. Kenkel, Chairman of the Department of Sociology at the University of Kentucky, that im-

---

[11] On two occasions county officials have telephoned the Office of the Attorney General for clarification of consent requirements pertaining to abortion. In both instances, the parents of an unmarried pregnant minor (ages 13 and 15 respectively) wanted their daughter to terminate her pregnancy, but the daughter was unwilling to do so. In both cases, the question raised by the county official was whether the child could be compelled, against her will, to have an abortion. These situations demonstrate that parents frequently recognize that terminating a pregnancy is preferable to carrying the pregnancy to term. These situations also support the need for a statutory requirement that the patient consent in writing to the performance of an abortion. See Point II, ante.

plementation of Section 3(4) would tend to strengthen the family and society by enabling parents to carry out their responsibilities to their children (Kenkel, R. 239-240). That was one objective of the Missouri General Assembly in enacting Section 3(4). (O'Toole, R. 200.)

The legislative history of House Bill No. 1211 supports the conclusion that Section 3(4) was enacted only to assure that the pregnant minor receive the guidance of an adult with a particular concern for her welfare. The original version of the bill required the consent of both parents. The General Assembly concluded, however, that the consent of only one parent or person *in loco parentis* would accomplish the objective of assuring sensitive guidance. (O'Toole, R. 200.)

Implementation of Section 3(4) of House Bill No. 1211 imposes no additional burden on physicians in the practice of their profession, because even prior to the effective date of House Bill No. 1211, physicians required parental consent before performing an abortion on a minor (Widdicombe, R. 149, 164; Warren, R. 24, 72). Although the reason physicians require parental consent is to insulate themselves from civil and criminal liability,[12] the rationale underlying that liability is that parents are the appropriate persons to determine what medical care is in the best interest of their children.

Plaintiffs contend that it is preferable for the physician to evaluate the maturity and judgment of his patient, and if it appears that she is capable of giving an informed consent, then he should be free to perform the abortion without the consent of a parent. Defendant submits that the patient's parents are in a far superior position to evaluate the maturity of their daughter. Indisputably, they are in a better position to evaluate her ma-

[12] 61 Am.Jur.2d, Physicians and Surgeons, Sections 155-161, 283-290; Annotation, 76 A.L.R. 564-565 (1932); Annotation, 139 A.L.R. 1370, 1371-1374 (1942).

turity than are lay counselors who staff abortion clinics (Davis, R. 137; Widdicombe, R. 156), or the physician who will meet the child for the first time when she arrives at the clinic for an abortion, and who will spend a total of twenty-six minutes with her (Widdicombe, R. 159-160; Anderson, R. 350). See also, Point II, ante.

In addition, defendant submits that while twenty-one years of age constitutes majority for most purposes in Missouri, Section 3(4) of House Bill No. 1211 applies only to minors under the age of eighteen. This departure from the general rule reflects the intent of the legislature to protect only those who most need adult guidance.

By virtue of the foregoing, defendant submits that requiring the consent of a parent or person *in loco parentis* to a minor's abortion constitutes a reasonable means of furthering the long-standing interests of the State of Missouri in protecting minors from the consequences of a hasty decision on a critical matter and in supporting parents in the discharge of their familial responsibilities. Accordingly, the judgment of the district court declaring Section 3(4) constitutional must be affirmed.

V

The District Court Erred in Holding Unconstitutional Section 6(1) of House Bill No. 1211,[13] Because:

A. **The first sentence of Section 6(1) does not require physicians to employ abortion techniques designed to assure live delivery of the fetus.**

The district court erroneously found as follows:

> "The first sentence of Section 6(1) prescribes the standard of care which a person performing an abortion must exercise for the protection of the fetus, without reference to any particular stage of pregnancy." *Planned Parenthood v. Danforth*, 392 F.Supp. at 1371.

Accordingly, the court held "that the first sentence of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." *Id.* at 1371.

Defendant submits that Section 6(1) of House Bill No. 1211, including the first sentence thereof, establishes a standard of care that applies only after an abortion has been performed. The intent of the General Assembly is to protect the life of the fetus who survives the procedure by imposing upon physicians the affirmative duty to take reasonable and appropriate measures to

[13] Section 6(1) of House Bill No. 1211 provides as follows: "No person who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted. Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the life of the child, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo. Further, such physician or other person shall be liable in an action for damages as provided in Section 537.080, RSMo."

sustain its life. The district court's findings and conclusions to the contrary are not supported by the language of the statute, its legislative history or the evidentiary record below; accordingly, the judgment of the lower court is clearly erroneous and must be reversed.

The first sentence of Section 6(1) provides as follows:

> "No *person* who performs or induces an abortion shall fail to exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such *person* would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted." (Emphasis supplied.)

This sentence applies to the persons who perform abortions; it does not apply to fetuses. It describes a standard of care; it does not purport to describe the circumstances to which that standard of care applies.

The second sentence of Section 6(1) provides as follows:

> "Any physician or person assisting in the abortion who shall fail to take such measures to encourage or to sustain the *life of the child*, and the death of the child results, shall be deemed guilty of manslaughter and upon conviction shall be punished as provided in Section 559.140, RSMo."

This sentence describes the circumstances when the standard of care applies, namely when a live child results from the abortion procedure. When that occurs, the person performing the abortion must take measures to sustain and encourage the life of the child. "Such measures" are defined by reference to the standard of care described in the first sentence, which equates what the physician must do in an abortion situation with what he would do if a live birth were intended. The failure to take such measures, resulting in the death of the child, subjects the

person who performed the abortion to prosecution for manslaughter and suit for civil damages. Thus, the sanctions provided in Section 6(1) apply only when the following events occur: 1) an abortion is performed; 2) the fetus survives; 3) the physician fails to exercise his professional skill, care and diligence to encourage or sustain the life of the child; and 4) as a result, the child dies.

Application of Section 6(1), as so interpreted, does not infringe upon the right of women to terminate their pregnancies, and it does not interfere with the medical judgment of physicians in effectuating the woman's decision. The pregnancy has been terminated before Section 6(1) becomes operative. Section 6(1) focuses on the child who survives the procedure. Certainly, if the state has a compelling interest in protecting potential human life, *Roe v. Wade*, 410 U.S. at 162, 163, Missouri's right to protect actual human life cannot be contested.

Documentary material and testimony before the Missouri General Assembly support the conclusion that the life of a fetus who survives an abortion can be protected only by imposing upon physicians an affirmative duty (O'Toole, R. 180-181). The General Assembly has not specified what physicians must do to preserve the life of a fetus who survives an abortion. Instead, the imposed standard of care is equated with that which would obtain if a live birth were intended. Medical testimony at trial described what measures could be taken to encourage the life of the fetus. Warren, R. 67-68; Kerenyi, R. 103-105; Klaus, R. 278.

Plaintiffs interpret Section 6(1) as an imposition upon physicians of a standard of care to protect the fetus *during* the abortion. In other words, plaintiffs suggest that Section 6(1) requires that physicians employ an abortion technique or procedure designed to insure live delivery of the fetus. Because performing an abortion involves taking action which is deleterious to the fetus (Warren, R. 29; Kerenyi, R. 91), plaintiffs contend that Section 6(1) effectively precludes abortion.

If the General Assembly had intended to accomplish the objective plaintiffs describe, they would have specifically so provided, as did the Pennsylvania legislature, whose abortion statute was reviewed in *Planned Parenthood Association v. Fitzpatrick*, 401 F.Supp. 554 (E.D.Pa. 1975). Section 6605(a) of the Pennsylvania statute (35 Pa. Stat., Sec. 6601, et seq.) reads as follows:

> "Every person who performs or induces an abortion shall prior thereto have made a determination based on his experience, judgment or professional competence that the fetus is not viable, and if the determination is that the fetus is viable or if there is sufficient reason to believe that the fetus may be viable, shall exercise that degree of professional skill, care and diligence to preserve the life and health of the fetus which such person would be required to exercise in order to preserve the life and health of any fetus intended to be born and not aborted and the *abortion technique employed shall be that which would provide the best opportunity for the fetus to be aborted alive so long as a different technique would not be necessary in order to preserve the life or health of the mother.*" (Emphasis supplied).

It is noteworthy that although this provision incorporates a standard of care identical to the first sentence of Section 6(1), the Pennsylvania provision specifically requires physicians to employ an abortion technique designed to assure live delivery of the fetus. Section 6(1) does not require that any particular abortion procedure be used. It is also noteworthy that plaintiffs misrepresent the holding of the court in *Fitzpatrick* by quoting only the standard of care portion of the statute and asserting that the district court declared unconstitutional a provision identical to Section 6(1). (Plaintiffs' Brief at 107).

Similarly, plaintiffs misrepresent the holding of the district court in *Hodgson v. Anderson*, 378 F.Supp. 1008 (D.Minn. 1974), *app. dismissed*, 420 U.S. 903 (1975). In that case the court held that ascribing human status and providing protection to a live-born fetus does not offend the standards of *Roe* and *Doe*, *supra*. 378 F.Supp. at 1017. The Minnesota provision was stricken because the definition of "viable" and "potentially viable" upon which it depended were constitutionally defective. 378 F.Supp. at 1017. For the same reason, the court in *Doe v. Rampton*, 366 F.Supp. 189 (D. Utah 1973), voided similar provisions in the Utah statute. 366 F.Supp. at 193, 196.

If Section 6(1) of House Bill No. 1211 required physicians to employ an abortion technique designed to assure live delivery of the fetus, plaintiffs' interpretation of the provision might be tenable. However, only defendant's interpretation of Section 6(1) is supported by the language of Section 6(1), by the legislative history of House Bill No. 1211 and by the testimony of its principal sponsor (O'Toole, R. 180-181; 211-214). It cannot be presumed that the General Assembly intended to sabotage the provisions of House Bill No. 1211 which clearly authorize abortions, by the sophisticated guise of Section 6(1) as interpreted by plaintiffs. See Section 1, House Bill No. 1211. Nor can Section 6(1) be interpreted to require physicians to employ abortion techniques designed to assure live delivery of fetuses, for it does not so provide.

In essence, plaintiffs ask this Court to construe Section 6(1) of House Bill No. 1211. If their interpretation of the provision were correct, the first sentence of Section 6(1) would be unconstitutional. If defendant's interpretation is correct, Section 6(1) constitutes a permissible exercise of the authority of the state of Missouri to protect human life. Faced with two diametrically opposed interpretations, one of which is constitutional, this Court should abstain from construing Section 6(1) and refer plaintiffs to their state courts for resolution of this

issue. *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Zwickler v. Koota*, 389 U.S. 241 (1967); *Harman v. Forssenius*, 380 U.S. 528 (1965); *Harrison v. NAACP*, 360 U.S. 167 (1959).

In any event, defendant submits that Section 6(1) manifests the clear intent of the legislature to protect only that human life surviving an abortion. The provision is therefore consistent with the compelling interest identified by this Court in *Roe v. Wade*, 410 U.S. at 160-163. When Section 6(1) is properly interpreted in accordance with the legislative intent, it does not contravene the parameters defined by this Court, for the constitutional right first described in *Roe v. Wade* is the right of women to choose not to bear unwanted pregnancies. Neither women nor their physicians have the right to be heedless of actual human life that survives the abortion procedure.

B. Assuming arguendo that this court concludes that the first sentence of Section 6(1) requires physicians to employ abortion techniques designed to assure live delivery of a fetus, that sentence is severable from the remainder of the section.

The district court concluded that only the first sentence of Section 6(1) was invalid:

> "The Court, therefore, holds that the *first sentence* of Section 6(1) is unconstitutionally overbroad for failure to exclude the stage of pregnancy prior to viability." (Emphasis supplied.) 392 F.Supp. at 1371.

However, the court directed and the clerk prepared judgment declaring ". . . that Section 6(1) of House Bill 1211 is unconstitutional and defendants are enjoined from enforcing Section 6(1) of House Bill 1211." 392 F. Supp. at 1374; paragraph 2, Order, Judgment and Decree, printed in the Appendix to the Jurisdictional Statement in Cause Number 74-1419, at 46. Defendant moved the district court to alter or amend its judgment

to bring it into conformity with the opinion. Appendix to the Jurisdictional Statement in Cause Number 74-1419, at 47-49. Defendant's Motion was overruled.

Section B of House Bill No. 1211 manifests the intent of the legislature that the provisions of the statute be severable. The first sentence of Section 6(1) defines a standard of care. The second sentence describes when and to whom that standard of care applies, but it also provides that the failure of persons performing abortions to take steps to encourage or to sustain the life of the child constitutes manslaughter. Even if the first sentence of Section 6(1) were declared unconstitutional, it cannot be doubted that the Missouri General Assembly intended to declare as manslaughter the failure to attempt to preserve the life of a child surviving an abortion. The first sentence of Section 6(1) is severable, and accordingly, the district court erred in declaring Section 6(1) unconstitutional in its entirety.

VI

The District Court Properly Declared Constitutional Section 7 of House Bill No. 1211,[14] Because Terminating Parental Rights Constitutes a Reasonable Means of Furthering the Compelling Interest of the State of Missouri in Protecting Actual Life.

The objective of Section 7 of House Bill No. 1211 is for the state to assume immediate custody and responsibility of the child

[14] Section 7 of House Bill No. 1211 provides as follows: "In every case where a live born infant results from an attempted abortion which was not performed to save the life or health of the mother, such infant shall be an abandoned ward of the state under the jurisdiction of the juvenile court wherein the abortion occurred, and the mother and father, if he consented to the abortion, of such infant shall have no parental rights or obligations whatsoever relating to such infant, as if the parental rights had been terminated pursuant to section 211.411, RSMo. The attending physician shall forthwith notify said juvenile court of the existence of such live born infant."

who survives an elective abortion. The provision is predicated upon a fact that has an obvious and direct relationship to the future welfare of the child, namely, that the parents consented to the attempted destruction of the unborn fetus. The purpose of an abortion is to kill the fetus (Anderson, R. 352; Warren, R. 29). A woman desiring an abortion does not want a live-born child (Anderson, R. 352, 357). Inherent in the decision to abort, therefore, is a threat to the future well-being of the child, which the legislature reasonably believed required the termination of parental rights.

Section 7 of House Bill No. 1211 applies only after the following events occur: 1) a woman consents to and obtains an abortion which is not necessary to preserve her life or health and 2) the fetus survives. This court held in *Roe v. Wade* that the state has an important and legitimate interest in the protection of potential human life. 410 U.S. at 162, 163. Certainly if the state can protect potential human life by prohibiting abortions from and after viability, the state can protect the life of a fetus who survives an abortion procedure.

Underlying Section 7 is the responsibility of the state for the protection of an unwanted child whom the mother knowingly tried to destroy. The General Assembly reasonably presumes that the child would be unsafe in his mother's custody and that the state must intervene. *Stanley v. Illinois*, 405 U.S. 645 (1972), is not dispositive, for in that case, "unfitness" was arbitrarily and irrationally presumed from the mere fact that the father was not married. Contrary to the situation in *Stanley*, the voluntary consent by a parent to a procedure intended to result in the death of the child bears a direct and reasonable relationship to the conclusion that parental rights should be terminated.

In the event that parents who consent to an elective abortion decide they want custody of the child, they may petition the

court. Section 7 provides that consenting parents of a child aborted alive shall have no parental rights or obligations as if their "rights had been terminated pursuant to Section 211.411 (sic) of the Missouri Revised Statutes." The correct provision, Section 211.441, RSMo 1969, adopted by reference in Section 7 of House Bill No. 1211, enumerates the circumstances under which parental rights may be terminated, which include abandonment of the child. When parental rights are terminated as provided in Section 211.441, RSMo 1969, the order of termination is not final for one year thereafter. See Section 211.511, RSMo 1969. Accordingly, the parents may petition the court to grant them custody on the ground that they are fit parents for the child, notwithstanding their prior consent to the abortion. The presumption of unfitness, therefore, is rebuttable.

Finally, defendant submits that no evidence was presented below indicating that the series of events to which Section 7 applies has ever occurred. Thus, the issue is an abstraction and not justiciable. *Golden v. Zwickler*, 394 U.S. 103 (1969). Further no plaintiff before this Court has standing to challenge Section 7, for this provision does not operate directly against any interest of plaintiffs. *Poe v. Ullman*, 367 U.S. 697 (1961); *Flast v. Cohen*, 392 U.S. 83 (1968).

By virtue of the foregoing, defendant submits that if this Court reaches the merits of the constitutionality of Section 7, the provision constitutes a reasonable measure designed to protect actual human life surviving the abortion procedure. Accordingly, the judgment of the district court declaring Section 7 constitutional must be affirmed.

VII

The District Court Properly Declared Constitutional Section 9 of House Bill No. 1211,[15] Because:

A. **The Missouri General Assembly reasonably determined that saline amniocentesis is deleterious to maternal health.**

Disposition of plaintiffs' challenge to Section 9 will have serious ramifications in two significant areas: 1) the authority of government, federal or state, to regulate methods of practicing medicine for the protection of public health; and 2) the extent to which courts will substitute their judgment for that of legislative bodies, federal and state, in determining the wisdom of specific regulations. It is defendant's position that: (1) the prohibition of saline amniocentesis constitutes a reasonable means of furthering the compelling interest of the state of Missouri in protecting maternal health; and (2) the finding of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health is supported by overwhelming medical evidence to which this Court should defer.

In *Roe v. Wade*, this Court held that the state has a compelling interest in protecting maternal health and that it may adopt reasonable regulations in furtherance of that interest applicable after the end of the first trimester of pregnancy. 410 U.S. at 164.

Because this Court has recognized the authority of the state to regulate abortion to protect maternal health, only two ques-

---

[15] Section 9 of House Bill No. 1211 provides as follows: "The general assembly finds that the method or technique of abortion known as saline amniocentesis whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor is deleterious to maternal health and is hereby prohibited after the first twelve weeks of pregnancy."

tions remain: (1) whether the Missouri General Assembly reasonably concluded that saline amniocentesis is deleterious to maternal health; and (2) whether the prohibition of saline amniocentesis effectively precludes mid-trimester abortion. On the basis of the following, defendant submits that Section 9 of House Bill No. 1211 constitutes a proper exercise of the State's authority to regulate abortions in the interest of maternal health.

Relying on substantial medical data and testimony, the Missouri General Assembly determined that the procedure known as "saline amniocentesis" is deleterious to maternal health. The Missouri legislature prohibited its use after the first twelve weeks of pregnancy[16] on the basis of other medical data describing the availability and advantages of alternative abortion procedures. O'Toole, R. 185-192, 207, 209; Def. Ex. J, R. 191-192, 192-194, 374-376; Def. Ex. K, R. 192, 192-194, 374-376; Def. Ex. M, R. 188-189, 192-194, 374-376; Def. Ex. R, R. 374-376; Def. Ex. W, R. 185-186, 192-194, 375-376; Def. Ex. X, R. 186-187, 192-194, 375-376; Def. Ex. Y, R. 187, 192-194, 375-376; Def. Ex. Z, R. 187-188, 192-194, 375-376; Def. Ex. BB, R. 189-190, 192-194, 375-376; Def. Ex. LL, R. 375-376; and Def. Ex. DD, R. 191, 192-194, 375-376.

The State of Missouri has the authority and the obligation to enact laws to protect the health and welfare of its citizens. In the context of abortion procedures, it may adopt reasonable regulations to protect maternal health, applicable after the first trimester of pregnancy. This Court should defer to the findings of the Missouri General Assembly, for in the words of Chief Justice Hughes, speaking for a unanimous Court:

[16] The procedure known as saline amniocentesis is not medically practicable prior to the fourteenth to sixteenth week of gestation (Warren, R. 61).

> "When the subject lies within the police power of the State, debatable questions as to reasonableness are not for the courts but for the legislature, which is entitled to form its own judgment, and its action within its range of discretion cannot be set aside merely because compliance is burdensome." *Sproles v. Binford*, 286 U.S. 374, 388-389 (1932).

See also, *Paris Adult Theatre, I v. Slaton*, 413 U.S. 49 (1973); *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962).

The overwhelming medical evidence introduced in the court below supports the finding of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health and should be prohibited.

The procedure identified by the legislature as "saline amniocentesis" involves the insertion into the amniotic cavity of a needle or catheter, the removal of a substantial amount (100 to 200 ccs.) of amniotic fluid, and the injection of a like volume of saline (Kerenyi, R. 115-116; Warren, R. 61-63; Klaus, R. 259; Anderson, R. 309). The effect of hypertonic saline is to withdraw fluid from the cells, disrupt the metabolism, and denature the proteins in the fetus, the decidua and the placenta (Warren, R. 64; Klaus, R. 260). As a result, the fetus dies (Warren, R. 64-65). Labor begins in approximately twelve hours (Anderson, R. 310), and the fetus is expelled from the uterus twenty to thirty-six hours after the injection (Klaus, R. 274). In order to shorten the injection-delivery interval, physicians frequently (in 50 percent of the cases, Warren, R. 79) use oxytocin in conjunction with saline, which activates the uterine muscles (Warren, R. 76; Klaus, R. 270; Anderson, R. 310).

Severe complications are implicit in the use of saline amniocentesis, regardless of the skill of the physician or the precautions

taken (Hall, Deposition, part of which was read into evidence, R. 369; Def. Ex. E, R. 374-376; Def. Ex. G, R. 374-376; Def. Ex. I, R. 374-376; Def. Ex. K, R. 374-376; Def. Ex. P, R. 374-376; and Def. Ex. R, R. 374-376). One of the most serious of these is disseminated intravascular coagulation or consumptive coagulopathy (Warren, T. 57-58; Kerenyi, R. 100; Klaus, R. 269-270; Anderson, R. 307; Def. Ex. H, R. 374-376 and Def. Ex. M, R. 188-189, 192-194, 374-376). In virtually one hundred percent of the cases, some effect on the clotting mechanism of blood occurs (Klaus, R. 269-270; Warren, R. 57; Anderson, R. 307; Def. Ex. H, R. 375-376). In aggravated cases, severe bleeding may occur and result in death (Warren, R. 58), or require, as in three of Dr. Kerenyi's cases, a hysterectomy to prevent death (Klaus, R. 270).

Hypernatremia constitutes another major complication peculiar to the use of hypertonic saline, even when the solution is properly administered (Klaus, R. 268). The patient's body struggles to correct the marked rise in blood sodium, which leads to both tissue dehydration and water intoxication. If these phenomena go uncorrected, the patient can quickly progress from coma to convulsions to death (Klaus, R. 268). Finally, saline, however skilifully administered, results in massive tissue destruction inside the uterine cavity (Anderson, R. 308).

Oxytocin is used in conjunction with saline in 50 percent of the cases (Warren, R. 79), and precipitates additional complications, namely, water intoxication (Anderson, R. 310; Def. Ex. L, R. 374-376) and cervical rupture (Klaus, R. 271). Water intoxication can result in damage to the central nervous system, rendering the patient a "vegetable" (Warren, R. 76-77; Klaus, R. 270-271). Cervical tearing can result from the tumultuous labor produced by the oxytocin (Klaus, R. 271). In addition, oxytocin intensifies the chance of clotting defects implicit in the use of hypertonic saline (Anderson, R. 310).

In addition to these dangers inherent in the use of hypertonic saline, there are extreme risks if the solution is improperly administered (Def. Ex. K, R. 192, 192-194, 374-376). If it is injected into the vein, or if too much saline is injected in the wrong location too rapidly, the consequences are often fatal (Warren, R. 54-56; Kerenyi, R. 113-114; Klaus, R. 273; Anderson, R. 308). But when saline is administered as slowly as it should be, the injection requires at least thirty minutes, during which time the patient may move and dislodge the needle (Anderson, R. 309). Short of death, malinjection of saline can cause so much tissue destruction in the uterus that a hysterectomy is necessary, or the patient may otherwise become infertile (Anderson, R. 308).

Although plaintiffs argue that the risks of morbidity and mortality are insignificant in comparison to the total number of saline abortions performed, the figures currently available do not accurately reflect the incidence of complications, for little followup is conducted on patients who receive abortions (Kerenyi, R. 122). Furthermore, many physicians have no experience with the procedures involved in saline amniocentesis, and, as the demand for abortions increases with legalization, these unskilled doctors will be called upon to induce mid-trimester abortions. As a consequence, the incidence of malinjection of saline and the concomitant hazards will be multiplied (Anderson, R. 309).

In the form of both articles and testimony, medical evidence describing the risks and consequences of saline amniocentesis were available to and considered by the Missouri General Assembly, as well as evidence describing the advantages of other procedures (O'Toole, R. 185-192; Def. Ex. J, R. 191-192, 192-194, 374-376; Def. Ex. K, R. 192, 192-194, 374-376; Def. Ex. M, R. 188-189, 192-194, 374-376; Def. Ex. R, R. 374-376; Def. Ex. W, R. 185-186, 192-194, 375-376; Def. Ex. X, R. 186-187, 192-194, 375-376; Def. Ex. Y, R. 187, 192-194, 375-376; Def. Ex. Z, R. 187-188, 192-194, 375-376; Def. Ex.

BB, R. 189-190, 192-194, 375-376; Def. Ex. CC, R. 190, 192-194, 375-376; and Def. Ex. DD, R. 191, 192-194, 375-376). Defendant submits, therefore, that the legislature reasonably concluded that saline amniocentesis is deleterious to maternal health on the basis of overwhelming medical evidence.

B. **Prohibiting saline amniocentesis constitutes a reasonable means of furthering the State of Missouri's compelling interest in protecting maternal health.**

Where two alternative methods of mid-trimester abortion are available, one of which is medically safer than the other, the legislature may reasonably prohibit the more dangerous procedure. The safest mid-trimester abortion procedure is the intra-amniotic injection of prostaglandin. Mid-trimester abortions also may be induced by surgery (hysterotomy and hysterectomy), the injection of various drugs, dyes or substances (intra-amniotically or extra-ovularly), and mechanical stimulation (metreurynter bag, bougies, Foley catheter, etc.) (Warren, R. 41, Kerenyi, R. 87; Klaus, R. 264-268; Anderson, R. 306-307; Def. Ex. P, R. 374-376; Def. Ex. Q, R. 374-376).[17]

The prostaglandin procedure entails inserting a needle into the amniotic sac, aspirating (*but not removing*, Anderson, R. 310) one cc. of fluid to insure the proper location, and injecting approximately 8 ccs. of prostaglandin (Warren, R. 62-63; Klaus, R. 258-259; Anderson, R. 309-310). No fluid is withdrawn, and because only a small quantity is injected, the procedure takes only a few minutes. Prostaglandin works by inducing con-

[17] Plaintiffs argue that the Missouri legislature has failed to prohibit hysterectomy and hysterotomy, which are less safe than saline (Plaintiffs' Brief at 125). In those situations where hysterectomy or hysterotomy are indicated, there is no safer procedure to use as an alternative (Anderson, R. 331, Klaus, R. 272). By way of contrast, prostaglandin is an alternative to saline amniocentesis, and because prostaglandin is safer, saline is prohibited.

tractions (Warren, R. 65; Anderson, R. 307); the mean injection-delivery interval is approximately fifteen hours (Klaus, R. 274).

The only adverse effects from prostaglandin abortions are nausea, vomiting and diarrhea (Warren, R. 47; Kerenyi, R. 97), which can be easily treated (Kerenyi, R. 99; Def. Ex. FF, R. 374-376). Use of prostaglandin cannot result in disseminated intravascular coagulopathy (Warren, R. 75; Anderson, R. 308), hypernatremia (Warren, R. 57; Anderson, R. 309), or water intoxication (Anderson, 308, 310-311). Of equal significance, the only consequences of malinjection of prostaglandin are a transient fall in the blood pressure, nausea, vomiting and diarrhea (Klaus, R. 274; Anderson, R. 309). There have been no reported deaths caused by prostaglandin (Klaus, R. 280; Anderson, R. 323).

Prostaglandins are superior to saline for yet another reason: they are more effective for inducing abortions (no failures, Anderson, R. 312). Furthermore, they are easier and faster to administer and the fetus is aborted sooner (Anderson, R. 310; Def. Ex. J, R. 374-376). There are fewer, if any, contraindications for their use. Saline amniocentesis is contraindicated for patients with renal, hypertensive or cardiac diseases (Warren, R. 51; Kerenyi, R. 102; Klaus, R. 267). By way of contrast, the only contraindications suggested by the manufacturer of prostaglandin are asthma and glaucoma (Anderson, R. 312).[18]

[18] Glaucoma is rare in women of child-bearing age (Anderson, R. 313). Preexisting asthma has been found to occur in only four-tenths of one percent of the women seeking abortion (Klaus, R. 266; Def. Ex. EE, R. 374-376). Dr. Anderson has discovered no adverse effects from using prostaglandins on patients with asthma (R. 313). Whatever effect prostaglandin has on women with glaucoma or asthma would be the same for a saline induced abortion because the production of prostaglandins occurs naturally in labor (Anderson, R. 339, 363-367). Furthermore, other mid-trimester abortion procedures, such as the metreurynter bag, could be used for patients with those symptoms.

With one exception, all medical witnesses who testified at trial agreed that prostaglandin was safer than saline amniocentesis (Warren, R. 56; Klaus, R. 274-276; Anderson, R. 308-309, 312, 328-329), including plaintiffs Freiman and Hall. The following portion of the deposition of plaintiff Freiman was read into evidence:

> "Q. Do you have any information on the risks to the health of the mother from prostaglandin?
>
> "A. The risk from prostaglandin is thought to be even less than the risk of saline amniocentesis." (R. 368).

The following portion of the deposition of plaintiff Hall was read into evidence:

> "Q. Do the problems or complications feasible (sic) with the saline procedure include others you haven't named yet?
>
> "A. Of the saline?
>
> "Q. Of the saline amniocentesis?
>
> "A. Mainly the number one complication would be a technical one if the saline were injected in the wrong place. The second is the rare complication of disseminated intervascular (sic) coagulation.
>
> "Q. And that would be regardless of the physician's skill, something that inheres in the procedure itself?
>
> "A. That is correct. That is why the prostaglandins have been developed and that is why we are developing others.
>
> "Q. To avoid that kind of complications?
>
> "A. Yes." (R. 369-370).

Only Dr. Kerenyi would not say that prostaglandin is safer than saline amniocentesis (R. 93-94), and his confidence in the

safety of saline was qualified by the necessity of strict adherence to the protocol he developed for its administration (R. 102).[19]

Based upon his extensive research with and experience in using prostaglandin to induce abortions, Dr. Gerald Anderson, Chief of Obstetrics at the Yale University School of Medicine, emphatically criticized those physicians who use saline instead of prostaglandins or who fail to inform themselves of the advantage of prostaglandins. The following questions were asked by plaintiffs' counsel and answered by Dr. Anderson:

> "Q. For a physician who chooses to perform second and later trimester abortion procedures by the saline method, in your opinion is that still a sound medical practice?"
>
> "A. If after presented with all the facts, if the physician chooses to use saline and has a bad outcome, then I think the patient would have good grounds for suit."
>
> "Q. That's not entirely responsive to the question."
>
> "A. All right. In my opinion, a physician, given all the facts on both methods, I would feel that he would be practicing bad medicine if he chose saline over prostaglandins, yes." (R. 336).

* * * * * * *

---

[19] It should be noted that Dr. Kerenyi's testimony was contradicted in several material respects. Dr. Kerenyi testified that the contraindications of saline ("hypertensive, vascular sufferers, those with severe uncorrected anemia," etc., R. 103), apply equally to prostaglandin (R. 102); Dr. Kerenyi stated that he derived this information from the circular published by Upjohn, the exclusive manufacturer of prostaglandin. Yet, Dr. Gerald Anderson, the physician described by Dr. Kerenyi as the primary medical investigator of prostaglandin (R. 121), testified that the same circular lists only asthma and glaucoma as contraindications for prostaglandin (R. 312). Dr. Kerenyi also suggested that hemorrhage and bleeding defects (R. 100) are becoming as prevalent from the use of prostaglandin as from saline amniocentesis; this, too, is contradicted by Dr. Anderson (R. 307-308). Finally, Dr. Kerenyi testified that only 776 abortions had been induced by intra-amniotic instillation of prostaglandin (R. 232); in fact, some 5,000 abortions have been performed with prostaglandin (Anderson, R. 323).

"Q. Is it a fair statement, then, to say that in your opinion approximately, based on your prior testimony, that 65 per cent of physicians in this country doing second or later trimester abortions are not using sound medical judgment?"

"A. No, I think that 65—all 65 per cent of these physicians have not read the medical literature enough to inform themselves about the advantages of prostaglandins."

"Q. Is that in and of itself not some reflection upon their medical practice, without being familiar with the literature?"

"A. Yes, it is." (R. 337-338).

Because of the dangers that attend saline amniocentesis, neither Dr. Anderson nor Yale-New Haven Hospital will perform saline abortions; both use prostaglandin instead (R. 307-308, 359).

Plaintiffs argue that the words "other fluid" contained in Section 9 of House Bill No. 2111 expand the coverage of Section 9 to include any midtrimester abortion procedure during which *any* fluid is inserted into the amniotic sac, including the intra-amniotic injection of prostaglandin. The clear intent of Section 9 is to prohibit only one procedure: the "method or technique of abortion known as saline amniocentesis." Other methods of midtrimester abortions, such as injection of prostaglandin, are not known as "saline amniocentesis."

The clause ". . . whereby the amniotic fluid is withdrawn and a saline or other fluid is inserted into the amniotic sac for the purpose of killing the fetus and artificially inducing labor," merely describes saline amniocentesis and it describes *only* saline amniocentesis. Only saline amniocentesis involves the withdrawal of amniotic fluid and the injection of saline (Kerenyi, R. 115-116; Warren, R. 61-63; Klaus, R. 259; Anderson, R. 309). Only saline operates to kill the fetus (Warren, R. 64-65).

Administering prostaglandin does not entail the withdrawal of amniotic fluid or the injection of saline, and prostaglandins are not injected for the purpose of killing the fetus (Warren, R. 62-65; Klaus, R. 258-259; Anderson, R. 307-310). The reference in Section 9 to "other fluid" was strictly an attempt by the legislature to include saline by whatever name identified, *e.g.*, salt, hypertonic saline, or sodium chloride. Although criminal statutes must be strictly construed, that principle of statutory construction does not override common sense and evident statutory purpose. The standard is satisfied if the words are given their fair meaning in accord with the manifest intent of the lawmakers. *United States v. Moore*, No. 74-759, 44 U.S.L.W. 4023, 4030 (December 9, 1975); *United States v. Brown*, 333 U.S. 18, 25-26 (1948).

Plaintiffs contend that the availability of prostaglandin is limited, and that the effect of prohibiting saline amniocentesis is "to foreclose effectively all post first-trimester abortions." (Plaintiffs' Brief at 116, 120 and 123). That contention of plaintiffs is not true. It is contradicted by the findings of the district court, and it is contradicted by the evidence presented at trial. The district court expressly based its decision with respect to the constitutionality of Section 9 on the availability of safe alternatives to the saline method. The court said:

"[t]he validity of the Missouri legislature's refusal to permit use of the saline method after the twelfth week of pregnancy must turn on the availability of safe alternative methods of inducing abortions."

* * * * * * * *

"The most significant of these methods is the intraamniotic injection of prostaglandin."

* * * * * * * *

"Nor is prostaglandin the exclusive alternative to saline amniocentesis. The mechanical means of inducing abortion

are also less dangerous. . . ." *Planned Parenthood v. Danforth*, 392 F.Supp. at 1373.

The finding of the district court that prostaglandin is an available alternative to saline is supported by the record. After a period of experimental use, prostaglandin was approved by the Food and Drug Administration for sale in January, 1974. During the first six months of 1974, the Upjohn Company restricted sales to around twenty medical centers from coast to coast so that information on its use would "diffuse gradually to all hospitals." (Anderson, R. 334, 335.) As of July 18, 1974, the date on which Dr. Anderson's deposition was taken, prostaglandin was being used not only in large teaching centers, but also in "small hospitals all over the country." (Anderson, R. 342.)

Plaintiffs argue next that prohibiting saline amniocentesis infringes upon their rights as physicians to practice their profession free from governmental interference. Defendant submits that there is no recognized constitutional right to practice medicine; indeed, this Court has so held. See *Dent v. West Virginia*, 129 U.S. 114 (1889), and cases cited therein. Nor do *Roe v. Wade* and *Doe v. Bolton* support plaintiffs' asserted right to practice medicine, for the right of physicians discussed therein is merely derivative of the woman's right to terminate her pregnancy and to effectuate that decision. The right of physicians was qualified as follows:

> "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment *up to the points where important state interests provide compelling justifications for intervention.*" (Emphasis supplied). *Roe v. Wade*, 410 U.S. at 165-166.

After the end of the first trimester, the interest of the state in protecting maternal health becomes compelling and justifies state regulation.

Basically, plaintiffs contend that once a physician is licensed by the state, he is entitled to practice his profession and exercise his medical judgment free from governmental regulation. Any abuse may be remedied adequately and exclusively by "judicial and intra-professional" procedures, "professional censure and deprivation of his license." (Plaintiffs' Brief at 126-127.) This Court's recent decision in *United States v. Moore*, No. 74-759, 44 U.S.L.W. 4023 (December 9, 1975), refutes plaintiffs' assertion that physicians, once licensed, are free to practice medicine as they see fit subject only to traditional judicial and professional remedies. The federal regulations questioned in that case specifically authorize the Secretary of Health, Education and Welfare, after consultation with the Attorney General, to ". . . determine the appropriate methods of professional practice in the medical treatment of narcotic addiction. . . ." 42 U.S.C. Section 257a (1970). This Court found the provisions of 21 U.S.C. Section 801, et seq., to manifest Congressional intent to "confine authorized medical practice within acceptable limits," 44 U.S.L.W. at 4029, and this Court concluded that physicians who go beyond "approved practice," as so determined, are subject to serious criminal penalties. 44 U.S.L.W. at 4030. If plaintiffs were correct in asserting that physicians, once licensed, are constitutionally immune from regulation, then the Food and Drug Administration has no authority to prohibit physicians from prescribing narcotics or untested drugs and medicines, and Congress and state legislatures alike are powerless to protect the public health.

Defendant submits that Section 9 of the House Bill No. 1211 constitutes a reasonable regulation in furtherance of the State's compelling interest in protecting maternal health. The findings of the Missouri General Assembly that saline amniocentesis is deleterious to maternal health and that other safer mid-trimester abortion procedures are available are supported by medical evidence, and this court should defer to these legislative determinations. *Ferguson v. Skrupa*, 372 U.S. 726 (1963); *Williamson v.*

Lee Optical, 348 U.S. 483 (1955); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Sproles v. Binford*, 286 U.S. 374 (1932).

By virtue of the foregoing, the prohibition against saline amniocentesis does not interfere with the right of women to terminate their pregnancies or the ability of physicians to assist in effectuating the abortion decision. Accordingly, the judgment of the district court upholding the constitutionality of Section 9 must be affirmed.

VIII

The District Court Properly Declared Constitutional Sections 10 and 11 of House Bill No. 1211[20] Because Reporting and Record-Keeping Requirements Do Not Unduly Interfere With the Abortion Decision or the Effectuation of That Decision.[21]

Implementation of Sections 10 and 11 has no impact on the woman's decision to terminate a pregnancy or on the effectuation of that decision, nor do these sections violate the privacy of the physician-patient relationship, for any information gath-

---

[20] Sections 10 and 11 of House Bill No. 1211 provide as follows:

"Section 10. 1. Every health facility and physician shall be supplied with forms promulgated by the division of health, the purpose and function of which shall be the preservation of maternal health and life by adding to the sum of medical knowledge through the compilation of relevant maternal health and life data and to monitor all abortions performed to assure that they are done only under and in accordance with the provisions of the law.

"2. The forms shall be provided by the state division of health.

"3. All information obtained by physician, hospital, clinic or other health facility from a patient for the purpose of preparing reports to the division of health under this section or

ered pursuant thereto must be kept confidential, as provided in Sections 10(3) and 13 of House Bill No. 1211. Because fundamental rights are not involved, the question herein is whether Sections 10 and 11 are rationally related to the state's interest in protecting the health of its citizens.

As the district court found, acquisition of data relating to abortion is essential to the advancement of medical knowledge and technology in this relatively new field of medical practice. *Planned Parenthood v. Danforth*, 392 F.Supp. at 1374. The importance of providing the means for gathering this data is highlighted by the fact that research reported in medical journals is based to a large extent upon statistical studies. Moreover, as noted by plaintiffs at page 23 of their brief, "Abortion data is now 'factual material of clear public interest.'" (See also pages 24 through 26 of Plaintiffs' Brief, and particularly page 24, wherein plaintiffs state that figures reported by the Center for Disease Control of the United States Department of Health, Education and Welfare are low because reporting is not mandatory and many abortion procedures are not reported.)

Plaintiffs contend that Sections 10 and 11 contravene the standards described in *Roe v. Wade* and *Doe v. Bolton*, because the information to be sought "applies to all abortions, regardless of gestational stage" (Plaintiffs' Brief at 127). It should be noted that provisions similar to Sections 10 and 11 were left intact in *Doe v. Bolton*, 410 U.S. at 201-202.

---

reports received by the division of health shall be confidential and shall be used only for statistical purposes. Such records, however, may be inspected and health data acquired by local, state, or national public health officers.

"Section 11. All medical records and other documents required to be kept shall be maintained in the permanent files of the health facility in which the abortion was performed for a period of seven years."

[21] At the time of trial no rules, regulations or forms had been promulgated pursuant to Sections 10 and 11.

Sections 10 and 11 do not single out abortion as plaintiffs suggest at page 127 of their brief. For example, physicians practicing in Missouri are required to report births and deaths (Section 193.100 and 193.140, RSMo. 1969), and communicable diseases (Sections 192.020 and 192.040 RSMo 1969). Their use of controlled substances is rigidly monitored by the state (Chapter 195, RSMo 1969).

Defendant submits that Sections 10 and 11 further the state's legitimate interest in protecting the health and welfare of its citizens. No fundamental rights are contravened by these sections, for they have no effect on the woman's decision to terminate her pregnancy or on the effectuation of that decision. Plaintiffs have failed to sustain their burden of proving that Sections 10 and 11 of the form promulgated thereunder are not rationally related to the state's interest in protecting the health of its citizens. Accordingly, the judgment of the district court declaring Section 10 and 11 constitutional must be affirmed.

CONCLUSION

As demonstrated above, House Bill 1211 represents a good faith and well-considered effort by the Missouri General Assembly to follow the guidelines of this Court in *Roe v. Wade* and *Doe v. Bolton*. In what for Missouri is the new field of legalized abortion, House Bill 1211 adapts some traditional and compelling interests of the State to the changing times. Those interests include the protection of minors, support of the institution of marriage, and preservation of the health and safety of the people.

For the foregoing reasons, Defendant prays that the judgment of the District Court be affirmed with respect to Sections 2(2), 3(2), 3(3), 3(4), 7, 9, 10 and 11, and reversed as to Section 6(1).

Respectfully submitted

JOHN C. DANFORTH
Attorney General

KAREN M. IVERSON
Assistant Attorney General

D. BROOK BARTLETT
First Assistant Attorney General

CHRISTOPHER R. BREWSTER
Assistant Attorney General
Supreme Court Building
Jefferson City, Missouri 65101
(314) 751-3321

Attorneys for Appellee (No. 74-1151) and Appellant (No. 74-1419) John C. Danforth

Certificate of Service

I, the undersigned appellant and a member of the Bar of the United States Supreme Court, do hereby certify that pursuant to Supreme Court Rule 33 I have caused to be served true and correct copies of the foregoing Brief of Appellee/Appellant, John C. Danforth, Attorney General of Missouri, upon each party required to be so served by depositing said copies in a United States post office or mail box, with first-class postage prepaid, addressed to Frank Susman, Esq., 7733 Forsyth Boulevard, Suite 1100, St. Louis, Missouri 63105, and Judith Mears, Esq., Yale University Law School, 127 Wall Street, New Haven, Connecticut 06520, Attorneys for Appellees Planned Parenthood of Central Missouri, et al., and to the Honorable J. Brendan Ryan, Circuit Attorney of the City of St. Louis, Municipal Court Building, 1320 Market Street, St. Louis, Missouri 63103.

John C. Danforth
Attorney General of Missouri
Supreme Court Building
Jefferson City, Missouri 65101
314 751-3321
Appellee (No. 74-1151) and
Appellant (No. 74-1419)